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In the Supreme Court of the United States

OCTOBER TERM, 1937

Nos. 3, 7, 8

ERNEST K. JAMES, INDIVIDUALLY AND AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, APPELLANT

v.

THE DRAVO CONTRACTING COMPANY

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY ET AL., APPELLANTS

v.

TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

DAVID H. RYAN, APPELLANT

v.

THE STATE OF WASHINGTON ET AL.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AND FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On June 1, 1937, the Court assigned these cases for reargument, "with direction to the Clerk to

give notice to the Attorney General of the United States who is requested to present the views of the Government upon the question (1) as to jurisdiction over the areas in which the work of the several contractors is being performed, and (2) whether the state tax imposes a burden upon the Government." We shall discuss the tax immunity question first.

SUMMARY OF ARGUMENT

I

A. The doctrine of reciprocal intergovernmental tax immunity did not originate in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). That case established the unilateral rule that Federal activities could not be taxed by the States. But in *Collector* v. *Day,* 11 Wall. 113 (1870), the doctrine was converted into one of reciprocal immunity, designed to protect both the State and the Nation from any taxation by the other which would threaten our dual system of government. An examination of the cases in which this Court has applied the rule to grant tax immunity to private persons shows that such an application is unsatisfactory and necessarily produces a body of constitutional law which partakes more of a rather rigid conceptualism than of a practical protection to the government with whom the private person deals. In these cases we ask that the Court restrict the rule of tax exemption so that a private person who sells to or

contracts with the Government cannot claim the immunity against taxation which properly belongs to the sovereign alone.

B. Both the contractor and the Federal Government derive manifold benefits from the maintenance of a government by the State in which the contract is performed. It seems evident that these should not be free. When the tax is imposed upon the contractor, as opposed to the sovereign itself, no attribute of sovereignty operates to prevent the tax that should compensate the State for benefits conferred upon the project.

It is true that the imposition of taxes such as these will ordinarily be reflected in the amounts paid its contractor by the Federal Government, with the result that it can no longer obtain contractors' services at bargain prices. But cost alone can present no threat of interference with the activities of the sovereign, so long as it be a cost imposed upon all alike. Further, the cost would be offset by Federal taxes upon those who deal with the States; and none can tell whether under future tax structures the balance will lie with the central government or with the States.

We ask, therefore, that this Court permit those who contract with the Government to be subjected to the normal tax burdens of those who contract with private persons. The validity of the tax should be tested only by the presence or absence of a discrimination against those dealing with the

sovereign. And the decisions of this Court indicate the readiness with which the sovereign can obtain protection against a discriminatory tax, which alone contains any threat to our dual system of government.

Since a non-discriminatory tax is no threat to our dual system of government, it may constitutionally be applied; for the sovereign tax immunity springs only from the necessity of preserving the dual system and does not extend beyond it. *Helvering* v. *Powers,* 293 U. S. 214, 224–225. Especially is this the case when it is considered that otherwise the increase in the number of persons who have business dealings with the Federal or State governments would result in a corresponding attrition of the sources of tax revenues.

C. The rule for which we are contending seems to us to be consistent with the cases which establish that the contractor who deals with the sovereign cannot for that reason claim an immunity against taxes upon his property, upon the goods which he purchases to perform the contract, or upon the net income which he realizes from the transaction with the sovereign. Indeed, a tax may validly be imposed upon the gross transactions of the contractor if his construction activity be viewed as more akin to manufacturing than to a sale. Cf. *Liggett & Myers Co.* v. *United States,* 299 U. S. 383. Taxes such as these are of unquestioned validity because it is "extravagant to say that an independent pri-

vate corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States." *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 382.

This Court has pointed out that almost every tax will affect the state or the nation to some degree. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523. It seems evident that once we pass beyond the simple criterion of whether or not the Government itself must pay the tax there can be no realistic distinction between the types of taxes which are sought to be imposed upon the private persons who deal with the sovereign. Any tax will be reflected in greater or less degree in the costs which the sovereign must pay. If the mere fact of additional cost to the sovereign does not exempt the private person, we see no satisfactory basis for distinguishing between the taxes which are applied to those who deal with the Government.

Not only is the Federal contractor subject to a large variety of state taxes, but he also is subject to the general body of the state regulatory power, so long as it does not conflict with an announced policy of the United States. The industrial and social regulation of the state may well serve to increase the cost of the project to the United States substantially more than would the taxes here in question.

We recognize that the principle for which we are here contending is contrary to the decisions of this Court in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; *Graves* v. *Texas Co.*, 298 U. S. 393. But we respectfully request the Court to reexamine these cases in the light of decisions such as *Liggett & Myers Co.* v. *United States*, *supra*, and in the light of the necessity for a coherent and practical administration of the tax laws of the state and the nation.

II

We have indicated our view that the contractors in these cases are not exempt from the state taxes by reason of their relationship to the Federal Government. It is also necessary to determine whether or not their work was performed on territory over which the states had taxing jurisdiction. If the work was done in an area within the exclusive legislative jurisdiction of the United States, the state tax, of course, could not be imposed.

There are two methods by which exclusive jurisdiction may be transferred from a state to the United States. One method is under Article I, Section 8, Clause 17 of the Constitution, and is brought about by a purchase of property by the United States with the consent of the legislature of the state wherein the property is located for the purpose of the erection of forts, magazines, arsenals, dockyards, or other needful buildings. The

other method is an affirmative cession of jurisdiction by a state to the United States. Both of these methods, however, are subject to the further restriction that no jurisdiction will pass unless there is an express or presumed acceptance of such jurisdiction by the United States.

1. *West Virginia.*—In West Virginia the requirements of Clause 17 have been met with regard to part of the areas. The legislature of the state has consented to the purchase of property for the erection of dams by a general statute. The requirement of Clause 17 with regard to the purpose for which the United States acquired the property has been met, because, in our opinion, a dam is a needful building. The term "needful building" has been given by this Court a steadily broadened interpretation through the years. *Battle* v. *United States,* 209 U. S. 36, 37; *Arlington Hotel* v. *Fant,* 278 U. S. 439. There has been a purchase by the United States within the meaning of Clause 17 of the land on the banks of the rivers, since a part of that land was acquired by deed from individuals and the remainder was acquired by condemnation, which we believe to be a purchase under Clause 17. The United States, however, has not purchased the river beds in West Virginia. These are the property of the state and the United States has acquired no title to the property, and hence no jurisdiction.

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Also the requirement of acceptance by the United States is met, in the case of West Virginia, because there is nothing in the acts of Congress or in the facts with regard to the dams in that state which would negative the ordinary presumption of acceptance. *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 528.

We conclude, therefore, that the United States has exclusive jurisdiction over all of the territory which it acquired for the erection of these dams on the banks of the rivers in West Virginia, but that the state retains its jurisdiction to tax the work done over the river beds.

2. *Washington.*—The cases before this Court arising from the State of Washington involve land owned by the United States and used in the construction of the Grand Coulee Dam. There is in existence in the State of Washington a statute of both consent and cession which clearly operates to transfer to the United States exclusive jurisdiction over at least a part of the areas so used, unless it be held that there has been no acceptance, by the United States, either implied or express.

The Grand Coulee Dam project is a part of a plan dealing with the entire Columbia River Basin by which it is contemplated to make extensive improvements in navigation, to control floods, to irrigate a vast area of public and private lands, and to develop power by which to assist the financing of the project. The construction of the Grand

Coulee Dam will require a force of several thousand men. A relatively large force will be permanently stationed there to maintain the dam and operate the power house. The State of Washington has no desire to surrender her municipal jurisdiction over this area, and the United States has no desire to assume the burden of local governmental regulation which is unrelated to the maintenance and operation of the Federal project.

We submit that in a situation such as this, exclusive jurisdiction will not vest in the United States either by cession or by a purchase with the consent of the state under Clause 17 in the absence of an acceptance of the jurisdiction by the United States.

In dealing with cession statutes, this Court has recurrently referred to the necessity of acceptance by the United States of the ceded jurisdiction. A similar rule operates in the field of international law. The reason is, especially with the existence of general cession statutes in most of the states, that the United States might otherwise be faced with the involuntary assumption of an unwanted jurisdiction. There is normally a presumption that the jurisdiction has been accepted, but this presumption must fall before a clear indication to the contrary.

We believe that a similar rule obtains in the case of jurisdiction which might otherwise be acquired under Clause 17. That clause does not impose a

duty on the Congress, but merely gives the power to exercise exclusive jurisdiction. If it were thought that jurisdiction necessarily vested whenever property was acquired with the consent of the state, the United States would often find itself possessed of an unwelcome jursdiction, which carried with it considerable disadvantages not only to the United States but also to the inhabitants of the territory acquired. It might be that such a result would place a practical limitation upon the power of the United States to acquire property. Certainly, in view of the undoubted power of Congress to retrocede jurisdiction, the United States must be held to have a corresponding power to refuse to accept it at the outset.

In the case of the territory acquired for the Grand Coulee project there has been expressed a clear intention not to accept the exclusive jurisdiction which otherwise would have passed to the United States. The contract for the construction of the Grand Coulee Dam was adopted and ratified by Congress in the Act of August 30, 1935, c. 831, 49 Stat. 1028, 1039. Under this contract the powers given the Federal Government relate merely to the performance of the contract and were necessary to insure satisfactory completion of the Federal project. The state, on the other hand, was expected to maintain its governmental jurisdiction over matters such as schools, police, sanitation, and the regulation of the contractor's camp generally. The state Workmen's Compensation Act was made ap-

plicable to the area. The actual practice of the Federal and state Governments, and of the inhabitants of the territory, similarly indicates the continued operation of the state laws. Since the state law would not be effective, and the state officers could not act, if the territory were exclusively Federal jurisdiction, the existence of these state powers, recognized by Congress, is conclusive evidence that the United States has not accepted exclusive jurisdiction over the area.

We conclude, therefore, that none of the Washington area is within the exclusively Federal jurisdiction, and that the state tax laws are applicable to work done in that area. If this view be rejected by the Court, there are a number of subsidiary questions which must be decided. For the possible convenience of the Court, these are discussed in our brief but will not be summarized here.

ARGUMENT

I

THE TAXES DO NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON THE FEDERAL GOVERNMENT

It is our position that the taxes involved in these cases should be sustained as against the contention that they involve an unconstitutional burden upon the United States.[1] In making the argument we

[1] Our discussion of this question is directed to the *Dravo* and *Mason* cases, Nos. 3 and 7, and to the *Ryan* case, No. 8, if it be held that the appellant properly raised the question in the state courts. See *infra*. pp. 108–109.

accept as axiomatic the principle that the maintenance of our dual system requires that in their respective spheres the state and national governments be free from interference by each other. However, we will ask the Court to reexamine certain applications of that principle.

We recognize, of course, that the entire question of intergovernmental tax immunity cannot be reopened in these cases. The only taxes the validity of which is challenged in these proceedings are gross receipts taxes of West Virginia and Washington as applied to the income of independent contractors engaged in the construction of dams for the United States. However, we believe that these cases do call for a reexamination of the decisions in which private persons having the independent status of vendors have been accorded protection from a general and non-discriminatory tax. Such a tax, we submit, should be sustained.

An examination of this issue can, we believe, more profitably be made, if the inquiry be pursued against the background of the general doctrine of intergovernmental tax immunity, with particular reference to its application so as to exempt from taxation private persons who deal with the sovereign.

A. *Origin and Growth of the Doctrine of Intergovernmental Tax Immunity*

The doctrine that the sovereign is exempt from taxation is one of ancient standing in England.

Its revenue acts have been construed for centuries as being inapplicable to the Crown, and the principle has been said to rest upon the royal prerogative. See Kenyon, C. J., in *Rex* v. *Cook,* 3 T. R. 519, 522 (1790). See also *Coomber* v. *Justices of Berk* 9 A. C. 61 (1883). However, the American doctrine of intergovernmental tax immunity is a wholly independent development; it stems from entirely different roots and is neither a variation nor a transplanted form of the English rule.

The American doctrine is one of *reciprocal* immunity arising out of our dual system of government, and rests upon "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system." *Helvering* v. *Powers,* 293 U. S. 214, 225. This principle is of relatively recent origin and was formulated for the first time in *Collector* v. *Day,* 11 Wall. 113 (1870).

The doctrine did not, as has commonly been supposed, find expression in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). That case established a much more limited principle. The Court held invalid a Maryland tax or exaction which interfered with the power of the Bank of the United States to issue bank notes.[2] Chief Justice

[2] The statute forbade the branch of any bank which had been established in Maryland without state authority to issue notes except in specified denominations and except upon paper upon which a stamp tax had been paid to the State (4 Wheat., at 320–322).

Marshall was not concerned with any principle of reciprocal immunity predicated upon our dual system, but placed his decision solely upon the ground that under the Constitution the particular grant or grants of power authorizing the Federal activity in question rendered that activity supreme in any possible clash with the States. Indeed, the Court plainly indicated that the Federal taxing power could reach state activities.[3]

The rule of *McCulloch* v. *Maryland* was reaffirmed and applied in a number of cases before

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[3] The Court said (pp. 435–436):

"It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

1870 to invalidate state taxes on Federal activities or instrumentalities. *Osborn* v. *United States Bank,* 9 Wheat. 738 (1824); *Weston* v. *City Council of Charleston,* 2 Pet. 449 (1829); *Dobbins v. Commissioners of Erie County,* 16 Pet. 435 (1842); *Bank of Commerce* v. *New York City,* 2 Black 620 (1862); *Bank Tax Case,* 2 Wall. 200 (1864); *Van Allen* v. *The Assessors,* 3 Wall. 573 (1865); *The Banks* v. *The Mayor,* 7 Wall. 16 (1868); *Bank* v. *Supervisors,* 7 Wall. 26 (1868); *National Bank* v. *Commonwealth,* 9 Wall. 353 (1869).

But even in this early period, when the doctrine was relatively simple and had not yet been enlarged to immunize both state and Federal activities, the law of sovereign tax immunity had developed some rather finely drawn distinctions when applied to the claims of private persons that they be allowed to share this immunity. Thus, a New York capital stock tax upon banks measured by "their capital stock paid in or secured to be paid in, and their surplus earnings" was held invalid where a bank owned Federal securities, *Bank of Commerce* v. *New York City, supra;* whereas a Massachusetts capital stock tax on corporations, measured by a percentage of "the excess of the market value" of all its stock over the value of its real estate and machinery, was sustained regardless of ownership of Federal bonds. *Hamilton Company* v. *Massachusetts,* 6 Wall. 632 (1867). And another Massachusetts tax, on savings banks,

measured by a fixed percentage of "the amount of their deposits" found judicial sanction in *Provident Institution* v. *Massachusetts*, 6 Wall. 611 (1867), in spite of the fact that the complaining bank had invested a substantial portion of its deposits in Federal securities. See also *Society for Savings* v. *Coite*, 6 Wall. 594 (1867).

It was against this background of decisions under the less sweeping rule of *McCulloch* v. *Maryland* that the Court in 1870 announced the novel doctrine of reciprocal immunity in *Collector* v. *Day*. While the novelty of the doctrine of reciprocal immunity has vanished, its essentially conceptualistic nature remains.[4] The application of any broad doctrine "in nice cases always seems somewhat technical" (*Ellis* v. *United States*, 206 U. S.

[4] The Canadian courts have experienced a comparable difficulty with the doctrine of *Collector* v. *Day*. Based largely upon American decisions, they had held in a series of early cases that the salaries of Federal officers were not subject to provincial taxation. *Leprohon* v. *City of Ottawa*, 2 Ont. App. 522 (1878); *Ex parte Owen*, 20 N. B. 487 (1881); *Ackman* v. *Town of Moncton*, 24 N. B. 103 (1884); *Coates* v. *Town of Moncton*, 25 N. B. 605 (1886); *Regina* v. *Bowell*, 4 B. C. 498 (1896); *Ex parte Burke*, 34 N. B. 200 (1896). In 1906, however, the Privy Council, in a case from Australia held that the incomes of Commonwealth officials were subject to state taxation. *Webb* v. *Outrim* [1907], A. C. 81. Following that decision, the Supreme Court of Canada in 1908 applied the same principles to justify a provincial tax on incomes of Dominion officials. *Abbott* v. *St. John*, 40 Can. Sup. Ct. 597. Today, pursuant to specific statutory authorization, the Canadian Income Tax is applicable to

246, 260). But we feel that the application of the doctrine of intergovernmental tax immunity to private persons has introduced an extraordinarily large number of philosophic subtleties and practical contradictions into the body of constitutional law.

Thus, the validity of a tax may turn upon whether it is more properly to be called an income tax or an excise upon the exercise of a privilege. It has been held that the United States could not constitutionally require a corporation to include interest from municipal bonds in a tax upon its net income. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 503–506; 158 U. S. 601, 618, 630. But where the Federal tax is denominated an excise on doing business, or a corporate franchise tax, the interest from such bonds may be included in the measure of the net income. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171. And a comparable state tax may reach the interest payments derived from Federal securities. *Pacific Co.* v. *Johnson*, 285 U. S. 480. But compare *Macallen Co.* v. *Massachusetts*, 279 U. S. 620. All of these taxes, in terms of

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employees of provincial governments. R. S. 1927, sec. 3. The Dominion income tax as applied to provincial officials was upheld in *Caron* v. *King* [1924] A. C. 999.

Even though Section 125 of the British North American Act specifically provides that neither Dominion nor Province property shall be taxed, the leasehold interest is taxable when in the possession of a private lessee. *Smith* v. *Vermilion Hills*, 49 Can. Sup. Ct. 563 (1914).

their practical effect upon the borrowing power of the other sovereign, seem identical.[5] Yet their validity seems to depend upon the formula selected by the legislative draftsman.

Again, it has been held that both the Federal Government and the States may impose death taxes with respect to the devolution of bonds issued by the other. *Plummer* v. *Coler*, 178 U. S. 115; *Greiner* v. *Lewellyn*, 258 U. S. 384. Had the immunity been extended to such taxes, it would have enhanced considerably the value of those bonds, probably to a degree at least comparable with the enhanced value attributable to the income tax exemption. Yet in those cases the Court refused to confer upon the borrowing government an advantage over private borrowers corresponding to that which it had previously approved with respect to the income tax.

Although the doctrine of reciprocal intergovernmental tax immunity depends upon the broad principle that the United States is composed of states whose independent sovereignty must be maintained, it has been held that the bonds of one state are subject to taxation by another when held by a citizen of the latter. *Bonaparte* v. *Tax Court*, 104 U. S.

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[5] The statute declared invalid in *Pollock* v. *Farmer's Loan & Trust Co.*, *supra*, was, however, also applicable to individuals whose incomes from exempt securities cannot be reached by the franchise device. Whether this income could be reached by an excise tax upon the privilege of doing business is, under the decisions of this Court, problematical.

592. It would seem as important that the activities of one state be as free from interference from another state as from the United States itself. But the Court, through Chief Justice Waite, was unable to find the desired exemption in the absence of a specific constitutional provision (p. 595):

> It is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money at reduced interest; but, inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the States are left free to extend the comity which is sought, or not, as they please.

The doctrine of the *Bonaparte* case was restated in substantially similar terms in *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, 585.

Further, while state banks continue to be subject to Federal taxation (see *McCulloch* v. *Maryland*, 4 Wheat. 316, 435–436), national banks enjoy immunity from state taxation except as permitted by Congress.[6] See Revised Statutes, Sec. 5219; *Van*

[6] In *McCulloch* v. *Maryland*, *supra*, 408–409, the power of the United States to incorporate a bank was based on the fact that it facilitated the custody and transfer of federal revenues. Similarly, state banks may serve a comparably governmental purpose with respect to State revenues.

Allen v. *The Assessors,* 3 Wall. 573; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664; *First National Bank* v. *Anderson,* 269 U. S. 341. Cf. *Baltimore Nat. Bank* v. *Tax Comm'n.,* 297 U. S. 209.

While a state tax on bank shares collectible from the bank is valid even though the bank owns Federal securities which are not deducted in computing the value of the shares (*Cleveland Trust Co.* v. *Lander,* 184 U. S. 111; cf. *National Bank* v. *Commonwealth,* 9 Wall. 353), a similar tax becomes unconstitutional if there is no provision in the state statute authorizing the bank to reimburse itself from the shareholders. *Home Savings Bank* v. *Des Moines,* 205 U. S. 503. Thus, because of the legal theory of the corporation, the Court has distinguished between a tax on the shareholders and a tax on the bank itself, although the practical effect of these taxes upon the Federal borrowing power seems precisely the same.

Again, the Court has sustained a state property tax imposed upon a corporation chartered by the United States, assisted by loans and donations from Congress, two of whose directors were appointed by the President of the United States, which was under contract to transport mail, troops, etc., and the entire property of which was subject to a Federal lien. *Railroad Company* v. *Peniston,* 18 Wall. 5. Cf. *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375; *Central*

Pacific Railroad v. *California*, 162 U. S. 91; *Susquehanna Co.* v. *State Tax Comm.* (No. 1), 283 U. S. 291. Yet a wholly private corporation was held constitutionally immune from a state property tax imposed upon ores which had been mined from lands leased on behalf of Indian wards. *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609. Cf. *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Gillespie* v. *Oklahoma*, 257 U. S. 501. However, the Court in *Indian Territory Oil Co.* v. *Board of Equalization*, 288 U. S. 325, sustained a state *ad valorem* tax on crude oil held by a lessee of Indian lands. The *Jaybird Mining Co.* case was distinguished (p. 328) upon the ground that there the royalties reserved on behalf of the Indian wards had not yet been paid. See *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 4–5.

The difficulties inherent in a consistent application of the intergovernmental tax immunity doctrine are further illustrated in *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393. Under these decisions the validity of the tax which is assailed as a threat to our dual system turns upon whether or not the lease is under applicable state law a "sale" of the subsurface oil. And in *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, the Court sustained a Federal tax on the income derived from a *lease* of oil in lands owned by a municipality, dis-

tinguishing the *Coronado Oil & Gas Co.* case on the ground that there the lands were held pursuant to an "express trust."

We do not now question any of these decisions. The present cases involve taxes of a quite different nature. We wish only to suggest that, in the general field of intergovernmental tax immunity,[7] the application of the doctrine to protect private persons against taxation has produced standards of tax validity which are often conceptualistic rather than practical. The succeeding sections of Point I seek to demonstrate that a similarly unsatisfactory situation in this narrower field can be avoided only if the sovereign's immunity from taxation be denied the contractors who deal with it.

B. *Exemption from these taxes is undesirable and is not required by constitutional principles.*

The contractors in these cases are engaged in assisting the United States in the performance of an appropriate function, the improvement of navigation. The states are therefore constitutionally incapable of interposing obstacles to the fulfillment

[7] It will be noted that our discussion has been confined to the sole question of taxes upon private persons which have some effect on the sovereign. We have not entered into the cases which deal with the question of whether or not a given state activity is proprietary or governmental, or whether a given person or organization has sufficient of the attributes of the government to be declared to be a government instrumentality. These fields have problems of their own.

of this function, and any law which by design or necessary effect interferes with the ability of the Federal Government or its contractor to perform these activities would be invalid. We submit, however, that a non-discriminatory tax, the effect of which is merely to increase the cost to the United States, interposes no interference with the performance of these functions and is a suitable compensation to the states for the benefit accruing to the Federal projects from the maintenance of the State governments.

1. " 'Taxes are what we pay for civilized society * * *.' " See *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313. We cannot accurately gauge the benefits which the contractors and the Federal Government derive from the maintenance of government in the states.[8] It is certain that they are substantial.

The roads over which materials are taken to the dam are supplied by West Virginia or its political subdivisions. The contractor can more readily obtain employees because their children may go to schools maintained at State expense. Thieves and marauders are apprehended and punished by the State machinery. Fire protection is furnished.

[8] In making a more or less casual enumeration, we shall confine our discussion to the State of West Virginia. This is because in the cases which arise from Washington, involving construction in a remote area, the Federal Government and the contractor derive different, although no less important, advantages from the State than is the case in the typical contract. (See *infra*, pp. 92–96.)

The contractor is able to obtain skilled and intelligent labor due in large part to the maintenance of a civilized society on the part of the State of West Virginia and its political subdivisions.

These and other benefits the contractor and the United States receive from the State of West Virginia. It seems evident that they should not be free.

The gross receipts of a contractor are a fairly reliable index of the extent of his activity within the State, and consequently of his utilization of the benefits offered him by the State. We think it unlikely that, at least measured by the necessarily rough indices available for apportioning tax burdens, any just complaint can be leveled against this tax because it imposes a disproportionate burden. Cf. *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313. True, the contractor pays *ad valorem* taxes on such of its property as has a situs in West Virginia. And it may be that the State derives other revenues from this contractor which, at least to some extent, will offset the costs which it incurs in providing the benefits enjoyed. However, it is a futile task to attempt to allocate and to evaluate the fair cost of the benefits received. In taxation, as in government generally, we must be content with rough measures. If the State of West Virginia believes that a gross receipts tax upon contractors represents a fair blend of ability to pay the taxes with the benefits received by the tax-

payer, we submit that the appellee's relationship to the Federal Government should not be sufficient to remove the burdens imposed upon contractors generally.

The exemption of contractors would ordinarily be reflected in savings to the United States (see *infra*, p. 27), so that the United States would be able to purchase a contractor's services at less cost than could any private person. The question thus becomes whether the maintenance of our dual system requires that those who do business with the Federal Government should be exempt from a general tax, thereby in effect obtaining free benefits from the State, in order that those free benefits may be passed on to the Federal Government. We think the question bears its own answer. Viewed solely as one who wishes to construct a dam in the Kanawha River, the United States is receiving its full measure of the governmental benefits extended by the State of West Virginia. Without them, the dam could not have been constructed unless the United States were willing to move into the ungoverned territory and set up the full panoply of governmental powers and duties in order that the dam might be constructed.

Once the dam is constructed, the United States is in a position to continue receiving the benefits of the civilized society maintained by the government of West Virginia. The citizens of the surrounding territory will be educated. They will be law

abiding. The State will stand ready to offer police and fire protection. Access to the dam will be over state roads. It is evident that in the maintenance, as in the construction of the dam, the United States will derive indirect benefits from the activities of the government of West Virginia, the importance of which cannot well be over-estimated.

Of course, if the tax, on its face or in fact, were imposed on Government contractors alone, it would be invalid as imposing a disproportionate burden upon a Federal activity. But here the tax is imposed upon all. And we submit that there is nothing in the philosophy of our dual system that requires the states to accord a preferred status to the Federal Government or those who deal with it.

We recognize that the logic of our analysis of benefits received would lead to taxation of the sovereign itself. But the attributes of sovereignty may be such as to prevent a tax from being imposed on the Government itself.[9] Certainly, the principle of the tax immunity of the sovereign itself is too firmly established now to be reexamined. But when the philosophic limitation against taxing the sovereign is absent, as in the case of a tax on its

[9] The taxes which are imposed upon the State when it acts in a proprietary capacity are, however, evidence that there is no necessary or inherent impossibility of direct taxation of the other sovereign. See *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; cf. *United States* v. *California*, 297 U. S. 175; *Board of Trustees* v. *United States*, 289 U. S. 48; *Snyder* v. *Bettman*, 190 U. S. 249. Cf. *United States* v. *Perkins*, 163 U. S. 625.

contractors, the practical desirability of paying for benefits received should have full sway.

2. The United States would, it is true, realize considerable savings in undertaking its construction projects if its contractors be given a preferred status.[10] As we develop at a later point (*infra*, pp. 48–49), we believe the rule applied in these cases must also cover sales taxes imposed upon those who sell to the Government. If the vendor who sells to the government be given a preferred status, the United States would also realize substantial savings in its purchases. We have attempted in Appendix B, *infra*, pp. 119–129, 133, to make a rough estimate of the effect upon the Federal treasury of a decision sustaining these taxes.

But cost alone, when it is merely the amount normally paid by the ordinary purchaser, is in no sense a threat to the capacity of the Government to perform its functions. It merely results in a somewhat larger appropriation than would be necessary if the Government could purchase at bargain prices.

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[10] Of course, the decision of this Court will not affect the cost to the United States of the work called for by these particular contracts. In the *Dravo* case it is stipulated that the amount of the tax was not included in the contractor's bid or contract price (R. 375). We entertain no doubt but that the *Ryan* and *Silas Mason* cases involve a similar situation. But since future contractors will make their bids in the light of the decision of this Court, the savings now possible for the United States might not then be obtained if the Court were to accept our views. But cf. Section 14 of the Washington statute, Laws of 1935, c. 180.

It needs no argument to show that ordinarily a nondiscriminatory state tax on the contractor will not be so large as to influence the decision of the Federal Government to engage in the contemplated activity.

Outside the field of taxation, state laws may palpably affect the cost of commodities, either by direct price regulation or by wage regulation in the manufacture of the commodities. See, e. g., *Nebbia* v. *New York*, 291 U. S. 502; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. And the price of commodities purchased by the United States may be increased in direct proportion to the operation of such laws. Yet it has never been suggested that such laws of general application are constitutionally defective merely because they may involve increased cost to the United States. The taxes in the instant cases in this respect have a precisely similar operation. If there be no discrimination, we think the United States has no complaint because it must enter the market place on a par with all other purchasers.

But even if cost were a pivotal consideration, there is still no reason to invalidate this type of tax. The additional aggregate cost to the United States resulting from the operation of such taxes will be at least partially offset by additional revenues from comparable Federal taxes as applied to those who deal with the States. Probably the bal-

ance will lie with the States rather than with the Federal Government under existing legislation. In appendix B, *infra,* pp. 129–133, we have also attempted a rough estimate of the additional revenues to the United States under the present tax statutes if the principle that we urge were adopted. But that estimate, even if it were accurate, would be of limited relevance, since the structure of the Federal and State tax legislation may be considerably altered in the course of time. Moreover, to the degree that the States receive additional revenue from these taxes, there should be a natural effect of lessening the claims of States for Federal aid. We are, after all, citizens of one nation. See *Hoke* v. *United States,* 227 U. S. 308, 322. The burden on the economy is the same whether the state receives a given amount of revenue by way of Federal grant or by taxing Federal contractors, or whether the taxpayer pays somewhat more taxes to the national or to the local government.

3. We have been urging that a tax which is not imposed on the sovereign does not interfere with its activities or threaten our dual system of government. To this general rule there is an important qualification. The tax which the State or the Federal Government imposes upon those who deal with the other must be non-discriminatory if it is to be valid. Neither the nation nor the State can be permitted to frame its tax laws with an eye to imposing *special* burdens upon the other. Such a tax

would be hostile in purpose and intolerable in legal effect.

Many decisions of this Court have emphasized or applied the principle that a discriminatory tax cannot be imposed upon those who deal with a sovereign. *McCulloch* v. *Maryland,* 4 Wheat. 316, dealt with a tax which was in fact discriminatory against the Bank of United States, a Federal instrumentality.[11] This Court has frequently emphasized the non-discriminatory character of a tax which it has sustained against the challenge that it was an infringement of the sovereign immunity from taxation. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226, 227, 229; *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279, 282; cf. *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493.

The Privy Council, in sustaining a Canadian income tax upon the salary of a provincial official, emphasized its non-discriminatory character. *Caron* v. *The King,* [1924] A. C. 999, 1006. And it was because of this feature that a provincial tax upon a Dominion official had been upheld in *Abbott* v. *City of St. John,* 40 Can. Sup. Ct. 597, 606–607, 609–610, 616 (1908).

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[11] The exaction there was applicable only to branches of banks not chartered by Maryland (4 Wheat. 316, 320–322). It was asserted by Pinckney in his argument that the Bank of United States was the only such bank operating in the State (4 Wheat. at 392) and this apparently was not challenged by opposing counsel or doubted by the Court.

The Court has, on the other hand, invalidated taxes, which otherwise would be constitutional, because of a purpose or effect to discriminate against the sovereign. A tax upon shares of stock or a franchise tax upon a corporation measured by assets or income is valid even though the assets of the corporation may in part consist of bonds of the other sovereign.[12] Yet the State cannot constitutionally impose a tax of this general character, the purpose or effect of which is to distinguish between interest on Government bonds and income generally. In *Miller* v. *Milwaukee*, 272 U. S. 713, the Court found an invalid discrimination against United States bonds in a state tax upon dividends received by stockholders where the stockholder was permitted to deduct the proportionate amount of corporate income which had been taxed under State laws. Similarly, in *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, this Court held invalid a tax upon the shareholders of trust companies measured by the net assets of the corporation. The Court stated that the tax would be valid had it been merely a tax of this form, even though the corporation derived income from Federal securities (p. 116). But, as the statute had been amended, the tax varied according as the corporation derived income from stock or

[12] *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Hamilton Manufacturing Co.* v. *Massachusetts*, 6 Wall. 632; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171; *Pacific Co.* v. *Johnson*, 285 U. S. 480.

bonds on which a tax had not been paid to the commonwealth. This Court held that, even though the deduction permitted was merely to avoid double taxation (p. 120), nevertheless it was discriminatory against Federal bonds and was invalid.

Again, Massachusetts amended its franchise tax upon corporations, measured by net income, to eliminate a provision excluding interest on tax exempt bonds from the computation of this income. The amendment was, in *Macallan Co.* v. *Massachusetts,* 279 U. S. 620, held to show an intent to tax the income from Federal bonds and the statute was declared invalid.[13] In *National Life Insurance Co.* v. *United States,* 277 U. S. 508, the Court struck down a limitation upon a deduction from the gross income of life insurance companies which was contained in the Revenue Act of 1921. The statute allowed the taxpayer to deduct four percent of the mean reserve, but this deduction was to be reduced by the amount of the deduction allowed under another clause of interest from tax exempt securities. It was held that the effect of this limitation upon the deduction, to which the taxpayer had no constitutional right, was to impose a tax upon the tax exempt securities. Cf. *Missouri* v. *Gehner,* 281 U. S. 313.

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[13] Compare *Educational Films Corp.* v. *Ward,* 282 U. S. 379. There, a New York taxing statute was sustained although, as pointed out in the dissenting opinion, there had been an amendment similar to that of Massachusetts.

Whether or not these cases are to be extended beyond their particular facts, they are illustrative of the ease with which the sovereign may secure constitutional protection against a discriminatory tax. It seems to us to be plain that this Court will strike down any statute which on its face shows a purpose or a probable operation to discriminate against the sovereign. And if the tax, while apparently harmless on its face, is *de facto* discriminatory, the courts may still protect against its operation. See, for example, the treatment of statutes which, although valid on their face, were successfully assailed under the due process clause in *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, and *Grosjean* v. *American Press Co.,* 297 U. S. 233.

Since there will be constitutional protection against a discriminatory tax, there is small occasion to fear that taxing the contractor upon his receipts from the sovereign can ever constitute an appreciable obstacle or danger to the performance of the Governmental function.

4. Our position, then, is that any tax should be held valid which is imposed upon the contractor rather than the sovereign, which does not discriminate against the sovereign, or affect the *performance* of the project in any way, as distinguished from its cost. So far as practical consequences are concerned, the principle would probably afford full protection against any threat to our dual system of government if it received

no further elaboration. Yet we should like to introduce one further qualification, to guard against some exceedingly unlikely situations.

The basis of the doctrine of intergovernmental tax immunity is that our dual system of government demands that both the state and national government be free from *interference* from the other. *Railroad Company* v. *Peniston,* 18 Wall. 5, 36–37; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128. We have indicated that a tax upon a contractor, the sole result of which is to increase the cost to the sovereign by the amount of the normal tax burden, presents no interference with its operations. But it may be that a state will some time cast a regulatory measure in the form of a tax, which though it be non-discriminatory, may affect the performance of a Federal contractor.[14] The validity of such a regulation, if attempted directly without the use of the tax device, would depend upon the circumstances. (See pp. 45–47, *infra.*) Where a direct regulatory measure would be unconstitutional, it should similarly be invalid if enacted in the guise of a tax. No State can apply a tax in a manner such as to conflict with the performance of a federal function. See *Osborn* v. *United States Bank,* 9 Wheat. 738, 867; *Pembina Mining Co.* v. *Pennsyl-*

[14] Conceivably, situations might arise in which it would be difficult to determine whether the tax was regulatory or merely one somewhat higher than might normally be expected. Such a situation, plainly rather remote and conjectural, may be met when it arises, if ever.

vania, 125 U. S. 181, 186; cf. *Arizona* v. *California,* 283 U. S. 423, 451–452.

5. Since the non-discriminatory requirement eliminates every substantial threat to the maintenance of our dual system, it is unnecessary for this reason to grant a tax immunity to the federal contractor. Accordingly, under the settled principles of this Court, the Constitution affords him no protection. For the scope of the doctrine of tax immunity is limited by its necessity. As the Court said in *National Bank* v. *Commonwealth,* 9 Wall. 353, 362:

> The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.

Again, in *Board of Trustees* v. *United States,* 289 U. S. 48, the Court declared (p. 59):

> The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations * * *. It is a principle implied from the necessity of maintaining our dual system of government * * *. Springing from that necessity it does not extend beyond it.

See also *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 328; *Helvering* v. *Powers*, 293 U. S. 214, 224–225; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523.

6. Finally, we suggest to the Court that the doctrine of tax immunity should be limited in the manner which we have been urging, in view of the increasing importance of governmental activities generally. We think it unnecessary to cite statistics to demonstrate that both the State and the Federal Governments are undertaking public services in an increasing degree, and have brought into business relations with themselves an increasing proportion of the economic activities of our system. Any doctrine of constitutional law which would prevent the imposition of taxes upon those who contract with a State or Federal Government must necessarily result in an increasing diminution of the sources of governmental taxation. This Court has recognized the importance of guarding against the attrition of governmental tax sources. In *Susquehanna Co.* v. *State Tax Commission* (No. 1), 283 U. S. 291, 294, it stated:

> The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other.

And in *Willcuts* v. *Bunn*, 282 U. S. 216, 225, the Court declared:

> The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.

See also *Helvering* v. *Powers*, 293 U. S. 214, 225; *United States* v. *California*, 297 U. S. 175, 184–185.

The tax assailed herein should therefore be sustained. It contains no threat to the sovereignty of the United States and affords no opportunity for a hostile state to interfere with the constitutional function of the national government. The reason for the immunity is absent here, and, as this Court has often said, the reasons underlying the principle mark the limits of its range.

C. *The decisions of this Court*

We will seek to demonstrate here that except for three cases, the decisions of this Court offer support to the view that the challenged taxes are valid.

They indicate to us that even though the taxes are passed on[15] to the purchasing government, they may, nevertheless, be imposed upon a contractor or someone occupying a similarly independent status.

1. The real property of the contractor, if he has any, may be subjected to state taxation, even though it is used in performing his contract with the United States. *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Central Pacific Railroad* v. *California,* 162 U. S. 91; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375; *Choctaw O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531. So, too, the State can impose a personal property tax upon the machinery and equipment which the contractor has brought into the State in order to perform its contract. *Taber* v. *Indian Territory Co.,* 300 U. S. 1; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362.[16] In *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, the Court sustained a use tax imposed upon the machinery and equipment used by the appellants in one of the cases now at bar; the claim of immunity because a government instrumentality was overruled in the District Court and not renewed in this Court (No. 418, 1936 Term). Each of these taxes is a part of the cost

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[15] When the burden of the tax is passed on it is not the act of the taxing sovereign. Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175.

[16] The tax in the *Gromer* case was imposed by a Federal territory, but the reasoning is applicable to a state tax. See *Domenech* v. *National City Bank,* 294 U. S. 199.

of performing the contract and will be passed on to the Federal Government to a more or less precise degree.

The contractor will pay State taxes on the goods which he purchases in order to fulfill his contract. *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *Tirrell* v. *Johnston,* 293 U. S. 533; cf. *Henneford* v. *Silas Mason Co., supra.* We entertain no doubt but that the logic of these decisions would sustain a gross receipts tax upon a subcontractor, to whom the appellee had let a part of the work. However, no realistic analysis could distinguish between the effect of taxes upon sales to the contractor, or subcontracts let by him, and a tax upon the receipts of the contractor himself. In each case the costs would be estimated by the contractors who submitted bids and would be reflected in the price paid by the Federal Government.

The contractor would be subject to a State income tax imposed upon the net income which he realized in the performance of his contract. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *General Construction Co.* v. *Fisher,* 295 U. S. 715. It is probable that this tax would not be as directly reflected in the amounts paid by the Federal Government as would the taxes paid upon sales to the contractor, or upon subcontracts let. But since the contractor, in submitting bids, would undoubtedly consider the existence of the State income tax and would measure the desirability of performing the

work within that State, or using his organization to perform a contract elsewhere, it seems relatively clear that to some extent at least the net income tax will be reflected in a higher cost to the Federal Government.[17]

If the gross receipts tax be considered a tax imposed upon the sale of combined services and goods, the economic burden upon the purchasing government differs in no manner from the burden cast upon it by a manufacturing tax imposed upon the vendor. Yet such a tax, because its technical incidence is directed at a step prior to the actual sale, would be valid. *Liggett & Myers Co.* v. *United States,* 299 U. S. 383. Similarly, the sovereign immunity does not prevent taxing the trans-

[17] It is to be noted that we do not dispute the real difference between a tax on gross income and one on net income. The former will be passed on to the purchaser much more readily than will the latter. This distinction is sufficient to sustain a state net income tax on interstate business, *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328–329, where a gross receipts tax would be invalid, *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, cf. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292. This result flows from the principle that the state cannot impose an additional cost upon the privilege of transacting interstate commerce. But in the intergovernmental tax immunity cases the true test, we submit, is not whether the tax will be reflected in higher costs to the sovereign but whether it interferes with it in a manner such as to threaten our dual system of government. The protection of interstate commerce requires the protection of private persons; their activity *constitutes* the commerce. But the contractor is not the sovereign, and protection of the Government does not require exemption of the contractor.

portation of commodities shipped by the seller to the other sovereign. *Wheeler Lumber Co.* v. *United States,* 281 U. S. 573.

The Court has already sustained a gross receipts tax upon a Federal contractor. In *Alward* v. *Johnson,* 282 U. S. 509, the tax was 4½ percent of the gross receipts of a bus operator who derived about half his income from the carriage of the mails. The decision seems based upon the facts that the tax was in lieu of property taxes and the proceeds were used for road maintenance. But the effect of the decision, so far as it requires the United States to pay more for such mail contracts, is the same as though these factors were not present.

These taxes may validly be imposed upon the contractor and those who deal with him. These and other taxes will have been imposed upon the production and sale of the goods and the machinery acquired by the contractor in order to perform the contract. The prices charged the contractor, and so the cost of the contract to the Federal Government, may normally be supposed to include these taxes, as they would any other cost. The burden of each of these taxes will ultimately reach the Federal Government. Yet none supposes that the sovereign immunity should extend back from the sovereign, when it is the ultimate purchaser, and afford a borrowed protection to each of the entrepreneurs who contribute their activity at one stage or another of the process of production and distribution.

We submit, if cost to the sovereign be the test of immunity, that there is no reason to single out the tax imposed upon the final transaction with the sovereign. In practical economic terms, the burden on the sovereign is just as direct in the case of the numerous taxes imposed at the various stages before the final transaction.

Nor, if legal or conceptualistic attributes of the sovereign are supposed to be the touchstone by which to determine the validity of intergovernmental taxes, should this tax be held to be invalid. Precisely as in the case of these other taxes, it is not paid by the government and in no manner reflects upon or derogates from the sovereignty of the United States.

The contractor is not the sovereign, as this Court has pointed out in no uncertain terms. Thus, in *Baltimore Shipbuilding and Dry Dock Co.* v. *Baltimore,* 195 U. S. 375, 382, the Court said:

> * * * it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, * * *.

Again, in *Fidelity and Deposit Co.* v. *Pennsylvania,* 240 U. S. 319, 323, this Court said:

> But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control.

The only effect of these taxes is to increase the cost to the United States, as it increases the cost to all other persons who wish contracts performed for their benefit in these states. But this Court has on several occasions pointed out that the State or the Nation is, to a greater or less degree, affected by virtually every tax levied by the other. If we pursued the causal lines which flow from the imposition of almost any tax, or any regulatory measure, we would find that sooner or later it impinged upon the other Government. Once we put behind us the tax which is imposed directly upon the sovereign, the question necessarily becomes one of degree. Thus, this Court in *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, said:

> In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and *vice versa.* Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

In *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279, 282, the Court said:

> Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government * * *.

> But the remote and indirect effects upon the one government of such non-discriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other.

We think it evident that once we pass beyond the simple criterion of whether or not the Government itself must pay the tax, and subject itself to the tax collection machinery of the State, there can be no satisfactory distinction between the types of taxes which are sought to be imposed upon the private persons who deal with the sovereign. Since the question turns solely upon the effect upon the sovereign, and since all taxes, in varying degrees, have this effect, we submit that the doctrine can have a rational and fair application only if all of these taxes are held to be within the taxing power of the Government, whether it be the Nation or the State. The attempt to distinguish between the varying types of taxes imposed on private persons, according as they interfere with the sovereign, is to perpetuate a rule which has proved to be unsatisfactory and inconsistent.

Perhaps as impressive as the taxes, the cost of which will be included in the contract price, is the large variety of regulatory measures which are enacted by the State and applied to the contractor, irrespective of the fact that his contract is made with the United States.

If the United States chooses to carry out the activity itself, the state is powerless to control or to regulate the manner in which the work is done. *Tennessee* v. *Davis,* 100 U. S. 257; *In re Neagle,* 135 U. S. 1; *Ohio* v. *Thomas,* 173 U. S. 276; *Boske* v. *Comingore,* 177 U. S. 459; *Johnson* v. *Maryland,* 254 U. S. 51; *Arizona* v. *California,* 283 U. S. 423, 451–452. But the reasoning of these cases makes it rather plain that the immunity from state regulation is a consequence of the fact that the regulation was applied to an activity of the United States itself. Thus, in *Ohio* v. *Thomas, supra,* 283, the Court said:

> The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to and by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the State in which their duties are performed.

The cases are few in which the independent contractor has sought to exempt himself from state regulation because he dealt with the federal government.[18] The only case directly in point which we have found is *Nickell* v. *Department of Labor and Industries,* 164 Wash. 589, where the court held the State Workman's Compensation Act applicable to an employee of the contractor with the United

[18] The court in *State* v. *Wiles,* 116 Wash. 387, 390, commented on the surprising lack of authority in this general field.

States, because the contractor is not the United States; the theory of the case would include regulatory activity generally. Indeed, the state may impose some degree of regulation upon the federal officers and employees themselves, even as to the manner in which they perform their official duties, if it does not conflict with or seek to control those duties. Thus, in *Johnson* v. *Maryland, supra,* the Court said (p. 56):

> Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States* v. *Hart,* Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth* v. *Closson,* 229 Massachusetts, 329.

We are thus relatively confident that the contractor can claim no exemption from state regulation, except so far as the regulation is in conflict with an announced or implied policy of the United States.

We suggest, therefore, that, *apart from supervening federal law or policy,* the contractor is fully subject to the police power of the State. His employment relations are subject to the state indus-

trial laws. If there be a limitation upon the hours of labor, the Federal contractor is bound by it. He must provide whatever protections against industrial accidents the state law compels. He must make full provision for sanitary facilities, as required by the state authorities. He may employ children or women only to the extent, and under the conditions, that the State will permit.

When the contractor's trucks go upon the State highways they do so subject to the power of the State to compel licenses for the truck and for the driver. Failure to obey these regulations, or failure to obey the speed laws, will subject the contractor to liability for State punishment which cannot be avoided by the plea that the goods which he carried were destined for a Federal dam.

The contractor's creditors not only can subject him to suit in the State courts, but can obtain execution against the machinery and structures which he is using to perform his contract with the United States. The interference with the accomplishment of the Federal function may in this manner amount to making it completely impossible for that contractor to fulfill his obligations. Yet none supposes that the State should be powerless to aid the creditors of the contractors merely because it might thereby embarrass the Federal Government.

We have in result a situation where the Federal Government enters the State and asks a contractor to build a dam for it. In almost every relationship

which the State has with private citizens within its borders, the contractor has precisely the same status as does a contractor for a private corporation. His liability to State regulatory and tax laws will, of course, increase to the Federal Government the cost of constructing the dam. But since the contractor is not the sovereign, and since his relationship with the State is precisely that of any other contractor, he must obey the police laws and pay the taxes which the State chooses to impose upon him. Neither in legal theory nor in terms of an economic burden upon the Federal Government is there any reason to except from this general rule the final transaction by which the contractor sells to the Federal Government his goods and his services.

2. There are, however, three decisions in which the Court declared invalid a sales tax as applied to a vendor of goods to the other sovereign. *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; *Graves* v. *Texas Co.*, 298 U. S. 393.[19] We are unable to see any distinction between the gross receipts tax upon a contract performed for the Government and a

[19] The Government filed an *amicus* brief in the *Texas Co.* case asking that the tax be declared invalid. It did not at that time ask the Court to reexamine the fundamental basis for the immunity, and upon the authority of the *Panhandle Oil* and *Indian Motocycle* cases the statute appeared to be unconstitutional. However, we now feel that the entire question should be reopened and that these cases not be considered to be binding.

sales tax upon goods sold to it. In each case the tax is imposed upon and collected from a private party, whose only claim to tax immunity is that his transaction is with the Government. In each case the effect of the tax is probably to increase the cost of the property or the contract to the sovereign. In neither case is there any interference with the governmental activities of the sovereign other than imposing upon it, as upon all other persons who buy similar goods or obtain similar services, the ultimate cost of contributing a fair share to the revenues of the Government which imposes the tax.

We, therefore, recognize that the position which we have been urging is contrary to those three decisions. But we submit that those decisions represent a departure from the sounder principles enunciated by the Court in other cases and that the dissent in each of them represents the correct view of the constitutional doctrine. Accordingly, we respectfully request the Court to reexamine those three cases in the light of other decisions of this Court, and in the light of the necessity for a coherent and rational administration of the tax laws.

Viewed as a purely conceptual matter, the taxes here involved seem valid under *Liggett & Myers Co.* v. *United States*, 299 U. S. 383. They are imposed with respect to the carrying on of a contracting business. To the extent that they may be considered as impinging upon specific opera-

tions they are levied upon the contractor's activities, which consist primarily of construction and fabrication. They thus seem to be closely allied to the manufacturers' tax, not payable until sale, which was sustained in the *Liggett & Myers Co.* case. If both the *Panhandle* and *Liggett & Myers* cases are good law, the validity of these taxes would thus seem to turn upon the wholly irrelevant choice of the characterization of the contractor's activity as that of sale or of manufacture. We cannot believe that the maintenance of our dual system of government requires so subtle a classification of taxes, and submit that the *Liggett & Myers* decision represents the sounder result.

Similarly, the tax upon the gross receipts of the contractor should be sustained, whatever the verbal formula in which the law clothes the tax. There seems no practical or economic reason to distinguish between the present tax and that upheld in *Alward* v. *Johnson,* 282 U. S. 509. There this Court sustained a 4½ percent gross receipts tax as applied to an automobile station line, about half of whose proceeds were derived from mail contracts. The tax was upheld because it was said to be in lieu of property taxes, although the property tax was only 3 percent and the gross receipts were about four times the market value of the property employed.

The *Silas Mason* case, No. 7, is itself an excellent illustration of the difficulty of making a rational

application of the rule that the contractor, but not those who sell to or perform work for him, is exempt from a tax upon his gross receipts.[20] The contracts with the United States were made by the Silas Mason Company, the Walsh Construction Company, and the Atkinson-Kier Company (R. 6). Yet all the work on the project has been done by Mason-Walsh-Atkinson-Kier Company, a Delaware corporation, organized to perform the work for which the first three companies had contracted (R. 6–7). Payments made by the United States to the contractors are paid over to the corporation. Although subject to the control of the contractors, the corporation is liable for all costs and penalties and retains the profits as its own property. (R. 36–37.) Since the corporation is not a contractor with the United States, it would seem to be subject to the gross receipts tax,[21] if the rule of *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466, be strictly applied. Unless this Court should declare that one who is not the sovereign cannot claim a sovereign immunity from a non-discriminatory tax, it must

[20] A similar problem would be present in the *Ryan* case, had the state officials chosen to assert the tax against the subcontractors (but see R. 2, 5–6, 7), and had the appellant raised the tax immunity point in the state courts (see *infra*, pp. 108–109). While Ryan himself performed the contract for the construction of the railroad (R. 15), he sublet the contract for excavating (R. 9, 17).

[21] The complaint and answer are ambiguous as to whether the state officials threaten to tax the contractors or the corporation (R. 14, 44).

either (1) declare that the corporation is a sub-contractor, and may constitutionally be subject to such a tax, or (2) declare that it is in reality the contractor, and so exempt.[22] The first alternative brings into clear relief the essentially conceptualistic and impracticable nature of the tax exemption, since none would suppose that the existence of a threat to our dual system could turn upon whether or not the contractor organized a subsidiary corporation. The second alternative involves the necessity that the Court look through the corporate fiction and requires that the doctrine of tax exemption be further refined to permit a tax on sub-contractors, *unless* they are controlled by the contractor.

If this Court should announce that gross receipts taxes and sales taxes may be imposed upon private persons, even though the transaction be with the sovereign, we believe that the law as to tax immunity will be brought into a reasonably harmonious condition, practicable to administer and without danger to the dual character of our Federal system. We therefore ask that this Court reconsider its decisions in the *Panhandle, Indian Motocycle* and *Texas Company* cases and that it extend to the taxing authorities of both the Federal and State governments the latitude which the basis of

[22] The appellants in the *Mason* case insist that the corporation has the status of "agent" for the contractors. The terminology is unimportant, since under the *Trinityfarm* case the question is whether or not the taxed transaction is with the sovereign or a private person.

the doctrine of sovereign immunity from taxation seems properly to permit.

II

THE UNITED STATES HAS EXCLUSIVE JURISDICTION OVER A PART OF THE AREA IN WEST VIRGINA, BUT OVER NONE OF THE AREA IN WASHINGTON

A. *Introductory*

We have argued that the contractors in these cases should not be declared exempt from the gross receipts taxes because their activities are in performance of a contract with the United States. However, a further question remains. If their activities were performed on territory over which the state had no jurisdiction, obviously there can be no tax upon the payments received for this work.[23] It is the view of the Government that exclusive legislative jurisdiction has vested in the United States over a part of the area used by the contractor in West Virginia in performance of its work, but that such jurisdiction has not vested in the United States over any of the area in Washington used by the contractors in the performance of their work.

Two methods are recognized by which the Federal Government may receive legislative jurisdic-

[23] None of the contractors is a ci zen or a resident of the state imposing the tax so there is no occasion to inquire whether the state could impose a gross receipts tax upon the business of its resident when carried on outside the state. Compare *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279–281.

tion over property acquired by it within a State. The first method is that prescribed by the Constitution. In Article I, Section 8, Clause 17, it is provided that Congress shall have power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

A transfer of jurisdiction by means of the operation of Clause 17 requires (1) that there be a purchase of the property by the United States, (2) that the purchase be made for the purpose of erecting a fort, magazine, arsenal, dockyard, or other needful building, and (3) that the legislature of the state consent to the purchase. *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647. The consent of the state to be valid need not be in the form of a cession, and the consent by a state apparently transfers *exclusive* jurisdiction to the United States.[24] *United States* v. *Unzeuta,* 281

[24] Qualifications to the consent by the state, intended to reserve a partial jurisdiction in the state are apparently inoperative. *Fort Leavenworth R. R. Co. v. Lowe, supra,* 534, 536–537; *Surplus Trading Co.* v. *Cook, supra,* 656–657; State

U. S. 138; *Surplus Trading Co.* v. *Cook, supra, Fort Leavenworth R. R. Co.* v. *Lowe, supra; Chicago & Pacific Railway Co.* v. *McGlinn,* 114 U. S. 542; *Arlington Hotel* v. *Fant,* 278 U. S. 439.

The second method by which exclusive jurisdiction may pass to the United States is through an affirmative cession of jurisdiction by a state. This method is entirely different from that authorized by Clause 17 of the Constitution. The United States may receive exclusive jurisdiction by means of a cession irrespective of the purpose for which the land is used. A state cession statute, however, must contain affirmative words ceding the state's jurisdiction to the United States, and the jurisdiction granted by a cession may be either exclusive or partial and may be qualified as the state sees fit, the terms of the cession fixing the extent of the jurisdiction received by the United States. *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* 538; *Palmer* v. *Barrett,* 162 U. S. 399; *United States* v. *Unzeuta, supra,* 142; *Surplus Trading Co.* v. *Cook,*

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v. *Mack,* 23 Nev. 359; cf. Opinion of the Attorney General to the Secretary of the Treasury, October 18, 1935, 38 op. A. G. —; compare *Opinion of the Justices,* 42 Mass. (1 Metcalf) 580, 8 Op. A. G. 102; *Ibid.* 418, 20 Op. A. G. 298; *Ibid.* 611; 31 Op. A. G. 260. A reservation of the right to serve process is an exception to the general rule, and may be operative without destroying the effect of the consent. *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* 533, 535; *Surplus Trading Co.* v. *Cook, supra,* 657; *United States* v. *Cornell,* Fed. Cas. No. 14,867 C. C. C. R. I.); *Mitchell* v. *Tibbetts,* 17 Pickering (Mass.) 298; Kent's Commentaries, Vol. 1 (1889), pp. 430–432.

supra. Since the vesting of a partial jurisdiction in the United States might leave the state taxing laws still effective, the inquiry in this case with regard to this second method of transfering jurisdiction must be whether there has been ceded a jurisdiction so complete as to forbid the application of the state taxing laws in the area.

Each of these two methods by which the United States may receive legislative jurisdiction over particular property from a state is, however, subject to a further restriction. We submit that jurisdiction will not pass by either method contrary to the desire of the United States. A transfer of power and responsibility as vital as the right to exercise legislative authority over a territory, must, in the nature of things, depend upon the concurrence not only of the granting but also of the receiving sovereign. This fundamental principle is, we believe, applicable as well to grants of jurisdiction between the states and the United States as to grants of jurisdiction between wholly independent nations. Consequently, it is our view that a presumed or express acceptance by the United States is necessary to the passing of jurisdiction from a state to the United States under either of the two methods set out above. The precedents and arguments supporting this view will be fully developed in our discussion of the area in the State of Washington, *infra,* pp. 77–90, where the question of acceptance becomes one of primary importance. It is sufficient here that, in our opinion, the determination

of whether jurisdiction has passed to the United States by a consent under Clause 17 or by an affirmative cession necessitates in every instance not only an inquiry as to whether the individual requirements of either or both methods have been met, but also an inquiry as to whether there may be found an express or presumed acceptance by the United States of the jurisdiction.

In the problems with regard to legislative jurisdiction over the areas involved in these cases, therefore, the questions are (1) whether there has been a *purchase* of any of the property by the United States for the purpose of the erection of forts, magazines, arsenals, dockyards, *and other needful buildings* with the *consent of the legislature of the state,* (2) whether there has been an affirmative cession of jurisdiction by the state over any of the property, and (3) whether there may be found an implied or express acceptance of such jurisdiction on the part of the United States.

B. *West Virginia*

1. *The requirements of Clause 17 have been met with regard to part of the area in West Virginia*

a. *The legislature has consented to the purchase*

We will first discuss whether the conditions which must be present to meet the requirements of the method of transferring exclusive jurisdiction provided by Article I, Section 8, Clause 17 of the Constitution are to be found in the West Virginia case.

One of these requirements is that there must be a consent by the legislature of the state to the purchase by the United States of the property. No consent statute specially relating to the land purchased by the United States in West Virginia for the construction of these dams has been enacted by the legislature of that state. However, there is in force in West Virginia a general statute relating both to consent and to cession of jurisdiction. Official Code of West Virginia, 1931, c. 1, Art. 1, Secs. 3, 4, *infra*, pp. 110–112.

Section 3 states in part:

> The consent of this State is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for * * * works for the improvement of the navigation of any watercourse * * *.
>
> * * * * *
>
> Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the United States shall for five consecutive years fail to use any such land for the purposes of the grant, the jurisdiction

> hereby ceded over the same shall cease and determine, and the right and title thereto shall revest in this State. * * *

The first paragraph taken alone clearly constitutes an unqualified consent to the purchase of sites for dams. The effect of the second quoted paragraph, the third in the section, as a cession statute will be discussed at a later point (*infra*, p. 69–70). The problem here presented is whether, in addition to being operative as an express cession statute, the third paragraph also constitutes such a qualification upon the consent granted in the first paragraph as to prevent exclusive jurisdiction from passing to the United States by purchase under Clause 17. In this connection, the provisions of Section 4 of the act seem important:

> The State of West Virginia reserves the right to execute process, civil or criminal, within the limits of any lot or parcel of land heretofore, or hereafter acquired by the United States as aforesaid, and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition.

Our search has discovered no decision of the Supreme Court of West Virginia construing these sections.

The first and second paragraphs of Section 3 and the provisions of Section 4, in slightly different language, appear in the West Virginia Code of

1923, c. 1, secs. 4, 5, and had their genesis at a much earlier date. West Virginia Laws of 1881, c. 20. This statute as it existed over a long period of years clearly gave an unqualified consent under Article I, Section 8, Clause 17 of the Constitution. The third paragraph of Section 3, ceding a concurrent jurisdiction, was added in the adoption of the Official Code in 1931. It is our view that this was a separate enactment of a statute *ceding* jurisdiction, independently of Clause 17, and not a qualification to the consent statute.

It is not to be inferred that the legislature, in revising the law and reenacting the first paragraph of Section 3, intended to change the nature and effect of the consent granted by that paragraph, unless such an intention is clearly expressed. See *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199; *United States* v. *Ryder*, 110 U. S. 729, 739–740. The language of the third paragraph of Section 3 expresses no such intention. That language is in the form of an affirmative grant of power, rather than in the form of a qualification or reservation. When the legislature in Section 4 wished to make an exception to the consent, they used express words of reservation. Furthermore, the reservations made in Section 4 would not be necessary if by the third paragraph of Section 3 the consent granted by the first paragraph was so limited that concurrent jurisdiction was reserved to the state in all cases.

For these reasons, we are of the view that the third paragraph of Section 3, Chapter 1, Article 1 of the Official Code of West Virginia, 1931, is not a qualification upon the consent granted by the first paragraph of that section. A similar situation was presented to this Court in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, where the Court said (p. 657):

> The release is not in form or substance a proviso but is an affirmative provision inserted as an independent section and we think it means what it says and no more. That the legislature understood how to use a saving clause or proviso is evident from the following which appears at the end of the first section: "*Provided,* that this grant of jurisdiction shall not prevent execution of any process of this State, civil or criminal, upon any person who may be on said premises."

Cf. *State* v. *Mack,* 23 Nev. 359; 20 Op. A. G. 242; *Ibid.,* 298; *Ibid.,* 611; 24 Op. A. G. 617; 31 Op. A. G. 260; *Ibid.,* 294.

Further, it may be that, even if the third paragraph in ceding concurrent jurisdiction were to be construed as a qualification to the consent given by the first paragraph, it must be taken to be inoperative. For qualifications as to the jurisdiction transferred by a consent to purchase property under Clause 17 apparently do not destroy the consent, which itself permits the transfer of exclusive jurisdiction. *Fort Leavenworth R. R. Co.* v. *Lowe,*

supra, 534, 536–537; *Surplus Trading Co.* v. *Cook, supra,* 656–657; *State* v. *Mack,* 23 Nev. 359; cf. Opinion of the Attorney General to the Secretary of the Treasury, October 18, 1935 (pp. 3–4), 38 Op. A. G. —; compare *Opinion of the Justices,* 42 Mass. (1 Metcalf) 580; 8 Op. A. G. 102; *Ibid,* 418, 20 Op. A. G. 298; *Ibid.* 611; 31 Op. A. G. 260.

The reservation in Section 4 of the right to serve process does not destroy the effectiveness of the consent. *Surplus Trading Co.* v. *Cook, supra; United States* v. *Cornell,* Fed. Cas. No. 14, 867 (C. C. R. I.); *Mitchell* v. *Tibbetts,* 17 Pick. 298; *United States* v. *Meagher,* 37 Fed. 875 (C. C. W. D. Texas); *Lasher* v. *State,* 30 App. Tex. 387; *In re Ladd,* 74 Fed. 31 (C. C. Neb.).

Similarly, the effectiveness of the State's consent is not destroyed by the further reservation in Section 4 of other jurisdiction "not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition." 6 Op. A. G. 577; 7 Op. A. G. 629. If the property is acquired under Clause 17 the jurisdiction of the United States is exclusive and the reservation is nugatory.

We submit, therefore, that the legislature of the State of West Virginia has properly expressed its consent to the purchase by the United States of property for the construction of dams in that State.

b. *The property was purchased for the erection of a "needful building"*

A second requirement of Clause 17 is that the property must have been purchased by the United States for the erection of forts, magazines, arsenals,

dockyards, or other needful buildings. The purpose for which the United States acquired the property here involved in West Virginia was for the construction of dams and locks for navigation purposes. We are of the view that these structures are "needful buildings", as that phrase is used in this clause of the Constitution.

Were the rule of *ejusdem generis* to be used as the sole guide in the construction of this provision, its application might well be said to be limited to buildings or reservations of a military or naval character. *United States* v. *Tucker*, 122 Fed. 518, 522 (D. W. D. Ky.); *United States* v. *Andem*, 158 Fed. 996, 1002 (D. N. J.); Howland, Digest of Opinions of the Judge-Advocates General of the Army, pp. 931, 940–941. Indeed, it is not improbable that the framers of the Constitution were thinking solely of that type of activity in adopting this clause.[25] Some early authorities indicate that the clause was confined to such activities.

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[25] When the clause was first submitted it was confined to "dockyards and arsenals" and "fortifications", and contained no provision requiring the consent of the state (Elliot's Debates, Vol. 5, p. 130). It was then advocated in a form which specified "forts, magazines, and other necessary buildings" (Ibid, p. 440). The Committee of Eleven on September 5 reported the clause as it appears in the Constitution, covering "forts, magazines, arsenals, dock yards and other needful buildings", except that there was no requirement for state consent. The clause was amended, to require that the purchase be "by the consent of the legislature in which the same shall be", in response to Gerry's fear "that the strongholds proposed would be a means of

See also *New Orleans* v. *United States*, 10 Pet. 662, 736; Story on the Constitution, 5th ed., Vol. 2, Sec. 1224. Cf. *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis.); *Opinion of the Justices*, 42 Mass. (1 Metcalf) 580, 581.

However, such a narrow construction has not been adopted. In *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 530, 541, this Court spoke of the power to acquire territory "for the erection of forts and other buildings for the defense of the country, or the discharge of other duties devolving upon it", and, again, for the construction of "forts, arsenals, and other buildings for public use." In *Battle* v. *United States*, 209 U. S. 36, 37, the Court stated that "there can be no doubt" that a post office is included among "other needful buildings." The decision established that the scope of the section is not limited to military activities. The word "building" has accordingly been given, over a long period of years, a very broad construction. *Arlington Hotel* v. *Fant*, 278 U. S. 439, held that the word embraced hot springs and the hotel as incidental to a military hospital; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, an army training and

awing the state into an undue obedience to the general government." Elliot's Debates, Vol. 5, p. 511. The description of these areas as "strongholds" carried over into the ratifying conventions (Elliot's Debates, Vol. 3, p. 437), and they were at least once referred to as "those places of arms which may be purchased of the state legislatures". *Ibid*, p. 291.

mobilization station; *United States* v. *Tucker, supra,* locks and a dam; *Sharon* v. *Hill,* 24 Fed. 726 (C. C. Cal.), a customs and court house; *United States* v. *Wurtzbarger,* 276 Fed. 763 (D. Ore.), an Indian school; *United States* v. *Andem, supra,* a post office; *Brown* v. *United States,* 257 Fed. 46 (C. C. A. 5th), a post office; 13 Op. A. G. 131, a military cemetery; 26 Op. A. G. 289, reservoirs and aqueducts; Op. A. G., to the Secretary of the Navy, dated January 30, 1935, 38 Op. A. G. —; naval air stations; and *Winston Bros. Co.* v. *State Tax Commission,* 62 Pac. (2d) 7 (Ore.), a jetty.

The question as to whether a dam constructed for navigation purposes is a "needful building" was before this Court in *Ohio River Contract Co.* v. *Gordon,* 244 U. S. 68, but the Court disposed of the case without deciding that question. The District Court for the Western District of Kentucky in *United States* v. *Tucker, supra,* has held that a dam is a needful building. The Supreme Court of Oregon in *Atkinson* v. *State Tax Commission,* 67 Pac. (2d) 161, has indicated that it was of the contrary opinion. A view was expressed in 6 Dec. Comp. Treas. 843, that a dam was not included in the words "or other public building of any kind whatever", as used in Section 355 of the Revised Statutes. Compare *Nikis* v. *Commonwealth,* 144 Va. 618, holding that a bridge is not a "needful building" within the meaning of Article I, Section 8, Clause 17.

We are of the opinion that a dam is within the scope of Clause 17. The clause has received a content which has steadily broadened through the years. In our view the decisions of this Court must be taken to mean that any *structure* which is used for a governmental function is a "needful building" within the terms of this clause.

c. There Has Been a "Purchase" of the Property on the Banks of the Rivers, but not of the Beds

The third requirement of Clause 17 is that the property must have been "purchased" by the United States.

In the case of each dam in West Virginia, tracts were secured by the United States on both sides of the river, some of the land being acquired by deed and the rest by condemnation. (No. 3, R. 381, 408.) Title to the river bed, however, was not acquired for any of these dams.

1. The property acquired by deed from private individuals in each State was clearly "purchased" within the meaning of that word in Article I, Section 8, Clause 17.

2. The property condemned is, in our view, also "purchased" under the terms of Clause 17. In its technical application, "purchase" includes every mode of acquisition of real estate known to the law except descent. *Kohl* v. *United States,* 91 U. S. 367, 374; *United States* v. *Inlots,* 26 Fed. Cas. 482 (C. C. S. D. Ohio); *United States* v. *Whipple Hardware Co.,* 191 Fed. 945 (C. C. A. 3d);

United States v. *Beaty*, 198 Fed. 284 (W. D. Va.); *Burt* v. *Merchants' Insurance Co.*, 106 Mass. 356; *Hoyt* v. *Van Alstyne*, 15 Barb. (N. Y.) 568; *Hurst* v. *Dippo*, 1 Dall. 20.

In the construction of statutes authorizing governmental units and subdivisions to "purchase" property, it has been held that the term includes the acquisition of title by condemnation.[26] *Kohl* v. *United States, supra; United States* v. *Inlots, supra; United States* v. *Beaty, supra; United States* v. *Whipple Hardware Co., supra; Trustees of Schools* v. *Berryman*, 325 Ill. 72.

In *Kohl* v. *United States, supra*, this Court held that the power of condemnation is essential to the independent existence and perpetuity of the Federal Government. There the Court said (p. 371):

> The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. *If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell,* or by the action of a State prohibiting a sale to the

[26] However, certain cases in State courts have held to the contrary: *Griffith* v. *Trenton*, 76 N. J. Law 23; *Nevins* v. *City Council of Springfield*, 227 Mass. 538; *Paris Mt. Water Co.* v. *City of Greenville*, 105 S. Car. 180; *Enterprise* v. *Smith*, 62 Kan. 815.

> Federal government, *the constitutional grants of power may be rendered nugatory,* and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be." [Italics supplied.]

While the case is not directly in point, the reasoning is persuasive here. It was the apparent intent of the framers of the Constitution that Congress, with the consent of the State, should be able to secure land for specified purposes and to exercise exclusive jurisdiction over that area in connection with the Federal purpose. We do not believe that it was intended that unwillingness on the part of a private citizen to sell, when the State has granted its consent, should deprive Congress of its exclusive jurisdiction. Such a construction would in effect make the acquisition of exclusive jurisdiction dependent upon the consent of the private owner as well as of the State. It would, further, lead to the creation of isolated patches of State territory where the United States acquired a tract largely by voluntary sale but partially by condemnation.

We submit, therefore, that the word "purchase" in Article I, Section 8, Clause 17 should be construed to include the acquisition of property by condemnation. 7 Op. A. G. 114.[27]

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[27] But compare *Lowe* v. *Lowe*, 150 Md. 592, 599, which contains a casual dictum that exclusive jurisdiction is not acquired upon condemnation.

3. The property rights in the beds of the Kanawha and Ohio Rivers were owned by the State of West Virginia. *Ravenswood* v. *Flemings*, 22 W. Va. 52; *Sand & Gravel Co.* v. *Northcott*, 102 W. Va. 519; cf. *Massachusetts* v. *New York*, 271 U. S. 65, 89. But the United States, under the commerce clause, has full power to use the river beds for the construction of the dams. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82. Accordingly, it acquired no title to the bed of either River, and therefore this much of the territory cannot be said to have been "purchased." It results that the State retains its jurisdiction over the river beds and that its tax laws can constitutionally apply in this restricted area.

2. *There has been no cession of exclusive jurisdiction*

As we have already pointed out (*supra*, p. 59), the West Virginia statute relating to consent under Clause 17 also contains an express cession of jurisdiction. Official Code of West Virginia, 1931, c. 1, Art. 1, Sec. 3, *infra*, pp. 110–112. However, this cession is of *concurrent* jurisdiction only. Although a cession of concurrent jurisdiction passes general legislative authority to the United States, it also seems clearly to retain general legislative authority in the state. Consequently, no jurisdiction has passed to the United States over the areas in West Virginia through the method of affirmative cession which would prevent state taxing laws

from applying to work carried on in those areas. Consequently, even if the cession statute were thought applicable to the river beds, the state would retain its taxing jurisdiction over them.

3. *Acceptance of exclusive jurisdiction may be presumed*

If jurisdiction is to vest either by consent or by cession, an acceptance, either express or presumed, is necessary. This matter is fully developed below (pp. 77–90), where it is shown that in the normal case acceptance by the United States may be presumed. Such a presumption clearly operates in connection with the West Virginia territory, since neither the Acts of Congress nor the surrounding circumstances indicate any desire on the part of the United States not to receive exclusive jurisdiction. See Act of July 3, 1930, c. 847, 46 Stat. 918, 928; H. Doc. No. 190, 70th Cong., 1st Sess.; H. Doc. No. 31, 73rd Cong., 1st Sess.; cf. Act of August 30, 1935, c. 831, 49 Stat. 1028, 1035.

4. *Conclusion*

The State of West Virginia has consented to the purchase of land under Clause 17. A dam is a "needful building" within the broad meaning which has been given the term as used in Clause 17. The land acquired by conveyance from individuals and that which was condemned was "purchased" under Clause 17. There is nothing to indicate a desire not to accept exclusive jurisdiction. As to this territory the United States therefore has

acquired exclusive jurisdiction under Clause 17. But the State retains its taxing jurisdiction over the beds of the Kanawha and Ohio Rivers, which were not acquired by the United States, as it does over the lands leased by the appellee from private persons (R. 408).

C. *Washington*

1. *The Consent and Cession Statute and the Grand Coulee Dam Project*

The cases before this Court arising from the State of Washington involve activities on property owned by the United States and used in the construction of the Grand Coulee Dam. Although in Washington no special consent or cession statute has been enacted with regard to this particular territory, there is a general statute which both consents to the acquisition of property under Clause 17 and cedes to the United States the jurisdiction of the state. Remington's Revised Statutes of Washington, Section 8108, *infra*, pp. 115–117. This statute by its terms applies to sites of locks, dams, and other necessary structures or purposes required in the improvement of the rivers and harbors of the state, and in ceding jurisdiction reserves no power of taxation. By reason of this statute, there can be no question but that exclusive jurisdiction over at least part of the property has passed to the United States, unless it be held that

there has been no acceptance by the United States of exclusive jurisdiction in the case of the Grand Coulee Dam.

It is our view that an acceptance by the United States is necessary to a transfer of exclusive jurisdiction by either consent or cession. It is also our view that there has been no acceptance, either express or presumed, by the United States of exclusive jurisdiction in the case of the Grand Coulee Dam. If these views are adopted, it will be unnecessary to decide the difficult questions as to what particular property is covered by the Washington consent and cession statute. For this reason, we will discuss the matter of acceptance before proceeding to the other questions.

The importance of the problem of acceptance in this case seems better understood in the light of the general nature and extent of the Grand Coulee Dam project.

The Columbia River flows in its general course from the northeast corner of the State of Washington to the Oregon border and flows between those States to the Pacific. It is the second largest river in the United States and a large volume of freight moves over its waters. It has also tremendous potentialities for irrigating a vast area which is now arid land. The navigable use of the river is handicapped and the irrigation made impossible because of the great variability of its water flow.

Its waters stem chiefly from the melting snows in the Canadian Rockies and from the rainfall in the surrounding territory. The river thus has two flood stages: the first at the time of the spring rains and the second when the snows farther north begin to melt. The remainder of the time the river is at a comparatively low stage.

The plan developed by the United States Army Engineers for the full development of the river contemplates the erection of a series of ten dams by which to provide a steady flow of water, to permit ocean-going vessels to go far into the interior, to provide reservoirs for the irrigation of public and private land, and to develop electric power as a means by which to finance the project. *Continental Land Co.* v. *United States,* 88 F. (2d) 104 (C. C. A. 9th), pending on certiorari, No. 249, October Term, 1937; *Henneford* v. *Silas Mason Co.,* 300 U. S. 597, No. 418, October Term, 1937, R. 2–4, 7. The Bonneville Dam, nearest the mouth of the river, is virtually completed.

The Grand Coulee dam is the key to entire development. It is contemplated that a tremendous reservoir, consisting of a lake running 150 miles to the Canadian border, will fill in behind the dam. This dam, when completed, will be about 550 feet high and 4,300 feet long. (*Henneford* v. *Silas Mason Co.,* 300 U. S. 597, No. 418, October Term, 1936, R. 8.)

To construct the foundation of the dam (the work embraced in the contracts here involved) requires a force which averages about 5,000 men. At least an equal number will be required to complete the remainder of the dam. When completed, a permanent force of considerable number will be required to operate the dam and power plant. Engineers Town has been built on Government owned property to house the employees of the United States working on the project and eventually to house the permanent force. A temporary town, Mason City, has been constructed by the contractors on Government property to house their employees.

In addition to the territory on which the dam is built and the sizable area of land in the vicinity which is required for the construction and operation of the dam, the United States has acquired, or will acquire, title to the large area which will be flooded by the reservoir.

The land and the dam will be permanently owned by the United States. However, the Supreme Court of Washington, in deciding in the *Ryan* case that the State had concurrent jurisdiction over the territory purchased by the United States in connection with the Grand Coulee Dam, held that the project was a cooperative undertaking by the State and the United States, in which the United States was exercising the power over navigation given it by the Constitution, and the State was exercising

the power over development of irrigation and electricity reserved to it by the Constitution (No. 8, R. 45–46, 48–49). In so stating, however, the court did not find the project unconstitutional, and, in fact, no party to these cases argues that any of the construction projects involved is beyond the powers of Congress. See *Arizona* v. *California,* 283 U. S. 423; *Ashwander* v. *Valley Authority,* 297 U. S. 288.

This view of the court that the Grand Coulee Dam was a joint undertaking by the United States and the State was probably induced by a purported contract between the United States and the State of Washington, which was attached as Exhibit 7 to the plaintiff's amended complaint in the *Silas Mason* case (No. 7, R. 27–35). In this purported contract was a provision giving the State an option to purchase the perpetual right to the entire power output of the first unit dam and power plant (Paragraph 14, R. 30), in which case the State would pay the cost of operation of the dam (Paragraph 19, R. 32). This provision undoubtedly was the basis of the statement by the Supreme Court of Washington that the State had an option to take over the entire project when completed (No. 8, R. 48). The execution of this contract was alleged in the complaint (No. 7, R. 5–6) and was not denied in the answer. However, the fact of the matter is that this purported contract was never executed on behalf of the United States and did not become effec-

tive. See No. 7, Plaintiff's Exhibit E, p. 14. On the contrary, in authorizing construction of the dam, the Secretary of the Interior and the Federal Emergency Administrator of Public Works specified that it should be strictly a Federal project, to be constructed, operated, and maintained by the Bureau of Reclamation of the United States. No. 7, Plaintiff's Exhibit E, pp. 14, 15.

We have, then, a situation where the United States has acquired title to a large amount of land for the operation of a tremendous navigation and irrigation project. Permanent residents at the project will be fairly large in number. Over a period of several years, while the dam is being constructed, they will number a good many thousands.

The State of Washington is anxious to retain a governmental jurisdiction over this area. The United States, which will have full control over all matters relating to the project itself, has no desire also to exercise the ordinary powers and duties of municipal government. The question before this Court is whether exclusive jurisdiction over the territory and its inhabitants has nonetheless passed to the United States.

2. Acceptance by the United States is Necessary to a Transfer of Jurisdiction by Either Cession or Consent

In view of this practical situation, it becomes important to inquire whether exclusive jurisdiction will pass under state consent or cession statutes contrary to the intention and desire of the United

States. We submit that it will not so pass, for the reason that an acceptance by the United States, either express or presumed, is necessary to perfect a transfer of legislative jurisdiction from a state to the United States.

1. It seems quite plain that no jurisdiction will pass by cession to the United States unless it accepts the jurisdiction.

In *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 528, this Court held that since the cession there conferred a benefit, acceptance by the United States was to be presumed in the absence of any dissent on its part. This holding would indicate that an acceptance of some sort by the United States, either express or presumed, must exist to support the transfer of jurisdiction. To the same effect, in *United States* v. *Unzeuta,* 281 U. S. 138, 143, it was stated that "* * * after this jurisdiction had been accepted by the United States, it could not be recaptured by the action of the State alone, * * *." Again, in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, it was said (pp. 651–652):

> As respects such a military reservation * * * the State undoubtedly may cede her jurisdiction to the United States and may make the cession either absolute or qualified as to her may appear desirable, provided the qualification is consistent with the purposes for which the reservation is maintained and *is accepted by the United States.* And where such a cession is made and *ac-*

> *cepted* it will be determinative of the jurisdiction of both the United States and the State within the reservation. [Italics supplied.]

See also, *People* v. *Lent,* 2 Wheeler's Criminal Cases (N. Y.) 548; *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. (2d) 644 (C. C. A. 9th), certiorari denied, 280 U. S. 555. The recurrent reference in these opinions to the acceptance by the United States could not have been accidental, and demonstrates that either an implied or an express acceptance is necessary before jurisdiction passes.

The necessity that there be an acceptance by the United States to perfect a cession from a state finds its counterpart in the law dealing with cessions of territory between nations. *Davis* v. *Police Jury of Concordia,* 9 How. 280, 292–293 Oppenheim, International Law (2d ed.), Vol. 1, pp. 286–287; cf. *Downes* v. *Bidwell,* 182 U. S. 244, 279; *Fleming* v. *Page,* 9 How. 602, 618. This rule is required by practical reasons, both as between nations and as between the United States and the states. A transfer of legislative jurisdiction carries with it not only benefits but also obligations (Cf. *Cincinnati Soap Co.* v. *United States,* decided by this Court May 3, 1937, No. 659, October Term, 1936), particularly where there are inhabitants in the territory for whom municipal law and government must be provided and maintained. Furthermore, a state

has the right to impose conditions on a cession to the United States (*supra,* p. 55), and these conditions might not be acceptable to the United States. Almost all of the states today have general statutes ceding jurisdiction over land purchased by the United States.[27] Were no question

[27] Our search has revealed forty-two states with general cession statutes of various types. Cf. Alabama Code, 1928, Secs. 1505, 1506; Arizona Civil Code (1913), Sec. 4634; Arkansas, Digest of the Statutes, 1916, Sec. 3802; Political Code of California, 1931 (Deering), Sec. 35; Colorado Statutes Annotated, 1935, c. 168, Sec. 3; General Statutes of Connecticut, 1930, Sec. 5064; Revised Code of Delaware, 1935, c. 2, Sec. 4; Florida, Compiled General Laws, 1927, Sec. 7; Georgia Code, 1933, Sec. 15–302; Jones, Illinois Statutes, Annotated, Sec. 137.08; Burns Indiana Statutes Annotated, 1933, Sec. 62–1001, Kansas, General Statutes, 1935, c. 27–102; Louisiana General Statutes, 1932, Sec. 2898; Maine Revised Statutes, 1930, c. 2; Secs. 7, 11; Maryland Code, 1924, Art. 96, Secs. 2, 17; Annotated Laws of Massachusetts, Sec. 7; Michigan Compiled Laws, 1929, Sec. 412; Mason's Minnesota Statutes, 1927, c. 1, Sec. 6–2; Mississippi Code, 1930, Sec. 6056; Missouri, Revised Statutes, 1929, Sec. 11073; Revised Codes of Montana, 1935, Sec. 25; Nebraska Compiled Statutes, 1929, Sec. 72–602; Nevada Compiled Laws, 1929, Sec. 2896; New Hampshire Public Laws, 1926, c. 1, Sec. 1; New Jersey Compiled Statutes, 1910, Sec. 211–121; New Mexico Statutes, 1929, Sec. 146–102; Cahill's Consolidated Laws of New York, 1930, c. 26, Sec. 211, c. 58, Secs. 52, 53; North Carolina Code of 1935, Sec. 8059; The Complete Ohio General Code, 1931, Sec. 13771; Oklahoma Statutes, 1931, Sec. 10054; Purdon's Pennsylvania Statutes, 1936, Title 74, Sec. 1; Rhode Island Code of 1923, c. 2, Sec. 3; South Carolina Code of Laws, 1932, Sec. 2048; South Dakota Compiled Laws, 1929, Sec. 5050; Williams Tennessee Code, 1934, Sec. 98; Vernon's Texas Statutes, 1936, Art. 5247; Revised Stat-

of acceptance on the part of the Federal Government involved, jurisdiction might pass automatically where that result was not desired or intended by either the State or the United States. Cf. *Atkinson* v. *State Tax Commission,* 67 Pac. (2d) 161, 168 (Ore.); Glick, The Federal Subsistence Homesteads Program, 44 Yale L. J. 1324, 1364–1365.

Generally, of course, jurisdiction over areas acquired for governmental purposes is beneficial to the United States. Acceptance by the United States of a cession, therefore, may normally be presumed. *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* 528; *Benson* v. *United States,* 146 U. S. 325, 350; *United States* v. *Holt,* 168 Fed. 141, 147 (C. C. W. D. Wash.), affirmed, 218 U. S. 245; *Robbins* v. *United States,* 284 Fed. 39, 44–45 (C. C. A. 8th); *United States* v. *Watkins,* 22 F. (2d) 437, 440 (N. D. Calif.); *People* v. *Mouse,* 203 Cal. 782; *Lowe* v. *Lowe,* 150 Md. 592, 596–597; *State* v. *Seymour,* 78 Miss. 134; *LaDuke* v. *Melin,* 45 N. D. 349. No such presumption should arise, however, where it appears from the circumstances surrounding the purchase that the exercise of exclusive jurisdiction by the United States was not intended. *Atkinson*

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utes of Utah, 1933, Title 27–0–1; Public Laws of Vermont, 1933, Sec. 52; Virginia Code, 1930, c. 4, Secs. 19, 19a; Remington's Revised Statutes of Washington, Sec. 8108; Wisconsin Statutes, 1935, c. 1, Sec. 1.02; Wyoming Revised Statutes, 1931, Sec. 118–102.

v. *State Tax Commission, supra,* 168–169; *Six Cos.* v. *DeVinney,* 2 F. Supp. 693, 698 (Nev.).

2. No case has heretofore arisen in this Court which required determination as to whether there is a similar necessity that there be a presumed or an expressed acceptance by the United States of the exclusive jurisdiction which is acquired under Article I, Section 8, Clause 17 of the Constitution.

It should be noted at the outset that Clause 17 is found in Section 8, which states that "The Congress shall have power * * *." Certainly, none of the other powers enumerated in Section 8 are mandatory.[28] Congress may exercise them or not as it chooses. It would be a strange result if, of the extensive powers given Congress in this Section, it were held that one, and only one, was mandatory in every case where there was an opportunity to exercise it. We think that Clause 17 must in this regard be read literally, and in the manner in which every other of the eighteen clauses of that Section is read. So read, the provision that "The Congress shall have power * * * to exercise like authority over all places purchased by the consent of the legislature * * *" means that this power is effective only if Congress chooses to avail of it.

[28] Many of the powers have been so continuously exercised that the life of the nation may properly be said to depend upon their continued operation. This, of course, does not make their exercise mandatory under the terms of the Constitution.

We recognize that the first part of Clause 17 reads:

> To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, *and the acceptance of Congress,* become the seat of the government of the United States. [Italics added.]

The absence of a similar provision for the acceptance of Congress in the second part of Clause 17 might be thought to mean that the exclusive jurisdiction in such cases vested whether or not there was an acceptance. Apart from the fact that this clause, which received only desultory attention in the Convention (see *supra,* pp. 63–64), cannot be interpreted with an eye too closely fixed upon grammatical niceties,[29] such an interpretation is, we think, demonstrably erroneous. The solemnity which surrounds the choice of a seat of government would properly seem to require that there be an express acceptance by the Congress; indeed, the Congress would seem necessarily to be formed expressly to accept the jurisdiction by its legislation establishing the seat of government. See Act of

[29] Thus, the term "needful buildings" has been interpreted in a much broader fashion than would be indicated by the rule of *ejusdem generis* (*supra,* pp. 63–64). The term "purchase" must necessarily be given a broader connotation than would attach by common parlance (*supra,* pp. 66–68). It has been necessary to make judicial provision for the *cession* of limited or exclusive jurisdiction by the States (*supra,* pp. 55–56).

July 16, 1790, c. 28, 1 Stat. 130. The omission of a similar provision for acceptance in the second part of the clause can mean no more than that an express acceptance by Congress is unnecessary. Accordingly, if the territory be acquired under Clause 17, we think that normally exclusive jurisdiction may pass to the United States, whether or not there be an express acceptance. But this does not mean that such jurisdiction will vest contrary to the clear intention of the United States. Such an interpretation, in contrast to what might be called the presumption of jurisdiction, would be at war with the necessary implication derived from the fact that Clause 17 is placed in Section 8, which enumerates only discretionary powers.

If there were doubt, it must be resolved in favor of the presumptive, rather than the inescapable, vesting of exclusive jurisdiction, because of the purposes of Clause 17 and the consequences of a contrary interpretation.

Situations may often arise where the United States would need title to the property being used by it for a purpose embraced in Clause 17 but would not desire exclusive jurisdiction. Cf. Lieber, Cessions of Jurisdiction by States to the United States, 32 Am. L. Rev. 78. The fundamental concept of our Union is that local matters are better regulated by the States, while affairs of national concern are committed to the United States. In places where there are civil inhabitants

in an area purchased by the United States, the local affairs of those inhabitants can generally be more desirably and easily handled by the State than by the United States. Exclusive jurisdiction of the United States over such areas results in the disenfranchisement of the residents. *Sinks* v. *Reese,* 19 Ohio St. 306; *In re Town of Highlands,* 48 N. Y. 795; *State* v. *Willett,* 117 Tenn. 334. It deprives them of the right to send their children to the public schools, *Opinion of the Justices,* 42 Mass. (1 Metcalf) 580, of the right to benefit by the poor laws (*Ibid.*), and of the right to sue for divorce in the State courts, *Lowe* v. *Lowe,* 150 Md. 592. *Cf.* 40 Harvard L. Rev. 130. Police protection would have to be furnished by the United States. Roads would have to be maintained by the Federal government. All offenses, including such matters as speeding and disorderly conduct, would be forced into the Federal district courts. We cannot believe that the Constitutional Convention intended consequences of Clause 17 such as these.

There is no compensating advantage to the Federal government which would flow from a rule which made it imperative that these federal islands be carved out of the State territory. State jurisdiction will not interfere with the functions of the United States in the area, since in this regard neither the United States nor its employee is subject to a conflicting exercise of the State police or other powers. (See *supra,* pp. 45–46.) Accord-

ingly, a construction of Clause 17 which would permit the United States to refuse to accept exclusive jurisdiction would seem to be not only most desirable but also the only interpretation which is consonant with the fundamental philosophy and intent underlying the Constitution.

Forty-two States have general statutes consenting to the purchase of property by the United States. A purchase by the United States of property for a purpose within Clause 17 would, therefore, almost always be subject to a pre-existing consent by the legislature.[30] Despite the early doubts

[30] See Alabama Code, 1928, Secs. 1505, 1506, 3147; Arizona Civil Code, 1913, Sec. 4633; C. & M. Digest of Statutes of Arkansas, 1921, Sec. 4564; Political Code of California, 1931 (Deering), Sec. 34; Colorado Statutes Annotated, 1935, c. 168, Sec. 2; General Statutes of Connecticut, 1930, Sec. 5064; Revised Code of Delaware, 1935, c. 2, Sec. 3; Compiled General Laws of Florida, 1927, Sec. 5; Georgia Code, 1933, Sec. 15–301; Idaho Code Annotated, 1932, Sec. 56–602; Jones' Illinois Statutes, Annotated, Sec. 137.07; Code of Iowa, 1935, Sec. 4; General Statutes of Kansas, 1935, c. 27–101; Carroll's Statutes of Kentucky, 1936, Sec. 2376; Louisiana General Statutes (Dart), 1932, Secs. 2897, 2898; Revised Statutes of Maine, 1930, c. 2, Sec. 10; Maryland Code, 1924, Act 96, Secs. 1, 19; Michigan Compiled Laws, 1929, Sec. 410; Mason's Statutes of Minnesota, 1927, c. 1, Sec. 6–1; Mississippi Code, 1930, Sec. 6055; Missouri Revised Statutes, 1929, Sec. 11072; Revised Codes of Montana, 1935, Secs. 24, 25; Nebraska Compiled Statutes, 1929, Sec. 72–601; Nevada Compiled Laws, 1929, Sec. 2895; New Jersey Compiled Statutes, 1910, Sec. 211–120; New Mexico Statutes, 1929, Sec. 146–101; Cahill's Consolidated Laws of New York, 1930, c. 26, Sec. 210, c. 58, Sec. 50; North Carolina Code of 1935, Secs. 8058, 8059; North Dakota Compiled Laws, 1913, Sec. 3; The

of Mr. Justice Story (*United States* v. *Cornell,* Fed. Cas, No. 14,867), this Court has held that the United States has full power to purchase and condemn land for constitutional purposes, without the consent of the State where the land lies, and to hold and use that land in a proprietary capacity. *Kohl* v. *United States,* 91 U. S. 367; *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 530–531; *United States* v. *Unzeuta,* 281 U. S. 138; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647. With the existence of general consent statutes in most of the States, however, the power to acquire property might be more or less seriously curtailed if it were held that despite the intention or desire of the United States exclusive jurisdiction necessarily passed upon the mere acquisition of property by the United States in those States. It is not without significance that Clause 17 is a grant of power to Congress, not a limitation on powers otherwise possessed. The power of purchase or condemnation should thus not be held to be qualified by a provision that was

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Complete Ohio General Code, 1931, Sec. 13770; Oklahoma Statutes, 1931, Sec. 10053; Oregon Code Annotated, 1930, Sec. 60–1303; Rhode Island General Laws, 1923, c. 2, Sec. 1; as amended by the Laws of 1927, c. 805, p. 164; South Dakota Compiled Laws, 1929, Sec. 5049; Williams Tennessee Code, 1934, Sec. 98; Vernon's Texas Statutes, 1936, Art. 5242; Public Laws of Vermont, 1933, Sec. 52; Virginia Code, 1930, c. 4, Secs. 19, 19a; Remington's Revised Statutes of Washington, 1930, Sec. 8108; West Virginia Code, 1931, c. 1, Art. 1, Sec. 3; Wisconsin Statutes, 1935, c. 1, Sec. 1.02; Wyoming Revised Statutes, 1931, c. 118–101.

intended only to grant to Congress additional powers. It seems to us necessarily to follow that the *power* of exercising exclusive jurisdiction should not be converted into an inescapable duty, such as to make less effective the powers of purchase or condemnation which are elsewhere derived.

Finally, the United States has undoubted power to cede back to the State any exclusive jurisdiction which it may acquire under Clause 17. *Renner* v. *Bennett,* 21 O. St. 431; *State ex rel. Cashman* v. *Board of Commissioners,* 153 Ind. 302; *In re Ladd,* 74 Fed. 31, 38 (C. C. Neb.); *McLaughlin* v. *Bank of Potomac,* 48 Va. 68. If there be this power of retrocession of jurisdiction it necessarily follows that Congress has the power to refuse to accept such a jurisdiction in the first place.

Problems similar to that presented here have arisen recently with regard to the Federal Subsistence Homesteads Program. Under this program land is purchased by a wholly owned Government corporation, and houses are erected which are subsequently to be sold, title remaining in the corporation as security for payment of the purchase price. The Attorney General in two opinions to the Secretary of the Interior (37 Op. A. G. 288; Opinion dated July 18, 1934, 38 Op. A. G. ——) has advised that since there is no reason for believing that Congress contemplated receiving exclusive jurisdiction over land purchased for this

program, the states would continue to have authority, even where they had given a consent under Article I, Section 8, Clause 17. Cf. Glick, The Federal Subsistence Homesteads Program, 44 Yale L. J. 1324, 1366–1367.

Congress, assuming that the buildings were "needful", in connection with the slum clearance program has legislated on the assumption that an expression of its intent not to receive jurisdiction would prevent jurisdiction from passing under the State consent statutes. Act of June 29, 1936, c. 860, 49 Stat. 2025, Sec. 1. See also the committee reports on that bill; S. Rep. No. 1693 and H. Rep. No. 2660, 74th Cong., 2d Sess. Cf. Act of March 1, 1911, c. 186, 36 Stat. 963, Sec. 12 (jurisdiction of States over national forests). To the same effect see Section 13 (b) of the Housing Act of 1937, approved September 1, 1937.

So far as the courts have considered this problem, their conclusions seem to agree with our analysis. The Supreme Court of Oregon in *Atkinson* v. *State Tax Commission,* 67 Pac. (2d) 161, 168, has directly held that exclusive jurisdiction did not pass to the United States under the State consent statute where the facts indicated that the United States did not intend to receive such jurisdiction. In *Six Cos., Inc.* v. *DeVinney,* 2 F. Supp. 693, the District Court for the District of Nevada, in holding that exclusive jurisdiction had not vested in the United States over the land purchased in connection with the Boulder Dam, relied (p. 698) upon

the indicated intention of Congress that towns established under the reclamation law should remain under State jurisdiction. A similar reliance is found in *In re Kelly,* 71 Fed. 545, 551 (C. C. E. D. Wis.), where it was held that the United States did not have exclusive jurisdiction over a soldiers' home. Kent's Commentaries (1889 Ed.), Vol. I, p. 429, in discussing the effect of a reservation of the right to serve process in a consent statute states that the *acceptance* by the United States amounts to an agreement to permit the free exercise of such process as being *quoad hoc* the process of the United States. In *United States* v. *Wurtzbarger,* 276 Fed. 753, the District Court for the District of Oregon held that an express acceptance by Congress was not necessary, but the opinion does not seem to have gone to the point of denying a power to reject exclusive jurisdiction. Compare *In re O'Connor,* 37 Wis. 379, where it was apparently held (p. 385) that an express exercise by Congress of jurisdiction was necessary to oust the jurisdiction of the State.[31]

In result, we are of the view that the exclusive jurisdiction which Congress may exercise under

[31] Mr. Justice Story, who was not considering this question, stated in *United States* v. *Cornell,* Fed. Cas. No. 14,867, that "land so purchased by the very terms of the Constitution, *ipso facto* falls within the exclusive jurisdiction of Congress." Kent's Commentaries, (1889 Ed.), Vol. I, p. 429, repeats this language. The statement merely represents a fortuitous choice of words in discussing an unrelated problem.

Clause 17 is not mandatory but permissive. It may normally be supposed that this jurisdiction will be accepted. (See *supra,* p. 80.) Accordingly, if the property be acquired under the conditions set forth in Clause 17, without contemporaneous circumstances indicating a non-acceptance of the exclusive jurisdiction, the State jurisdiction will irrevocably be lost until Congress should re-cede it to the State. But where Congress indicates that exclusive jurisdiction over particular territory was not to be vested in or exercised by the Federal Government, we submit that no such jurisdiction will pass under Clause 17.

We conclude that exclusive jurisdiction does not become vested in the United States either by cession from a State or by a purchase under Clause 17 with the consent of a State in cases where the United States has indicated a desire not to accept this jurisdiction. There is normally a presumption that jurisdiction was accepted, but this presumption does not serve to place on the United States an inescapable duty of assuming the municipal government of a territory which it may acquire without any desire to exercise exclusive jurisdiction.

3. *There Has Been no Acceptance of Exclusive Jurisdiction by the United States*

We submit that in the Grand Coulee Dam area the action of the United States forbids any presumption of acceptance of exclusive jurisdiction by the United States.

The contract for the construction of the Grand Coulee Dam prescribes the character of the project and precisely specifies the nature and extent of the activities of the contractor and the United States in the Government owned area and indicates the intended scope of the State jurisdiction (Plf. Orig. Ex. A and B, No. 7).

Congress itself has expressly adopted and ratified this contract. See *Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297, 301, 302. The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1039–1040, provides:

> SEC. 2. That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as "Parker Dam" on the Colorado River and "Grand Coulee Dam" on the Columbia River, are hereby authorized and adopted, and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate, and maintain dams, structures, canals, and incidental works necessary to such projects, and in connec-

> tion therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified. * * *

The contract for the construction of the Grand Coulee Dam is filed with this Court (No. 7, Ptf. Ex. A). It includes by reference, as a part of the contract, the specifications on which the bids were submitted and the contract let. These specifications are also filed with this Court (No. 7, Ptf. Ex. B). We believe that these specifications conclusively show that the United States has not accepted the exclusive jurisdiction offered by the general cession and consent statute of Washington.

It is true that there are provisions of the specifications which give power to the Federal officials over many matters, connected with the project and incidents of the Federal function, which would otherwise be controlled by municipal law:

"The contracting officer [the Federal official in charge] may establish * * * police rules and regulations for all forces employed under this contract, and if the contractor fails to enforce these rules the contracting officer may enforce them at the expense of the contractor." (Sec. 9.) The contractor is to provide such streets in the camp site "as, in the opinion of the contracting officer, may be required to provide for safe and satisfactory use by the public." (Sec. 35.) "The design, construction, operation and maintenance of the water

supply system shall be subject to the approval of the contracting officer." (Sec. 37.) Similar provisions apply to sewage and sanitation, except as subsequently indicated herein. (Sec. 38.) The contracting officer may determine what type of businesses may lease space in the contractor's buildings, must approve the leases and may terminate them for misconduct; liquor or gambling concessions are forbidden. (Sec. 39.) The rates to be charged for meals and lodging are prescribed. (Sec. 40.) The contractor shall furnish without charge, by arrangement with the State authorities, school facilities and instruction. "All such facilities and arrangements shall be subject to the approval of the contracting officer." (Sec. 42.) The Federal Government has a cooperative role in furnishing police protection. The contractor shall provide and maintain jail facilities, and shall cooperate with the State and Federal Governments in the maintenance of law and order. (Sec. 43.)

We have no desire to minimize the rather wide scope of these specifications. But it is to be noted that each of the powers and duties may be viewed as a provision necessary to insure satisfactory completion of the Federal project. Especially is this the case when it is noted that each is of temporary duration only. When the contract is completed, these powers and duties vanish. In this light they become not those attached to a municipal governmental jurisdiction but merely incidents of the

Federal power to construct a dam and improve navigation. The other specifications of the contract compel the conclusion that this is the correct view.

The State is expressly given one broad group of powers which are apparently *superior* to the control of the Federal Government. The specification (Sec. 35) dealing with the camp site contains a provision that—

> Regardless of the approval of the contracting officer, the contractor shall comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof, which affect the building, maintenance, or operation of the contractor's camp, * * *.

Similarly, the control of sewage and garbage is at least in part subjected to the jurisdiction of the State. Section 38 provides:

> The discharge of sewage into the Columbia River shall conform to the laws and regulations of the Department of Health for the State of Washington, and the point of discharge shall be subject to the approval of the contracting officer. All garbage and refuse shall be regularly collected at such intervals as may be approved by the contracting officer or by the proper state or local regulatory authority, and shall be disposed of * * * as approved by the contracting officer.

While the cost of providing school facilities, under the contract, is apparently to be borne by the contractor, the schools are plainly placed under state jurisdiction. Section 42 provides:

> The contractor shall make all necessary arrangements with the proper state and county authorities for school facilities and instruction * * * in the camp site, which shall be furnished without charge therefor by the contractor. All such facilities and arrangements shall be subject to the approval of the contracting officer.

Finally, Section 43 provides as follows for the maintenance of police protection:

> Police protection for the contractor's camp and for the area involved in and surrounding the construction work covered by these specifications will be furnished by the Washington State Patrol in cooperation with the government. The contractor shall provide and maintain in his camp site, without charge therefor, such jail facilities satisfactory to the Washington State Patrol as may be required in connection with law enforcement in his camp site, and shall cooperate with the Washington State Patrol and the Government in the maintenance of law and order in his camp site and on the work.

The actual practice of the state and national government has conformed to the indications of the contract, as shown by the testimony and stipulations in the *Mason* case, No. 7. School districts

have been formed under the laws of the state. (R. 106.) Local police officers, a local Justice of the Peace, and a local deputy coroner are acting under appointment by a county of the state. (R. 107.) Trials and convictions have been had before this Justice for violating the laws of the state in the area. (R. 107–108.) The fact that the United States required compliance (Art. 21 of Contract, Ptf. Ex. A, No. 7), and the contractors actually complied (R. 41, 46), with the State Workmen's Compensation Act indicates that the area is considered to be within State jurisdiction.[32]

The question of whether or not the United States accepted exclusive jurisdiction is not to be solved by weighing the respective extent of State and Federal jurisdiction exercised during the construction of the contract. So much of the jurisdiction exercised by the United States as seems to partake of a general, municipal form of governmental power continues only during the performance of the contract and may more accurately be viewed as powers exercised in order to insure the efficient performance of the Federal function of building the dam. The United States would have power to control these matters whether or not it had a general legislative jurisdiction over the area.

[32] This circumstance is not conclusive, of course, since the state law might validly apply outside its territorial limits. *Alaska Packers Assn.* v. *Commission*, 294 U. S. 532; cf. *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145; *Murray* v. *Gerrick & Co.*, 291 U. S. 315.

These circumstances would be persuasive, but there is one which seems conclusive. The terms of the contract, ratified by Congress, as well as the actual practice alike contemplate a very considerable array of State governmental powers to be exercised in the area. The laws which are enforced are State laws. The officials who enforce them are State officers. In contrast to the Federal powers, which are not incompatible with State jurisdiction, *no* State law could operate,[33] and *no* State official would have power to act, if the territory were under exclusively Federal jurisdiction. *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439; *United States* v. *Unzeuta,* 281 U. S. 138; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647; *Standard Oil Co.* v. *California,* 291 U. S. 242. In result, the exercise of *any* governmental powers by the State of Washington, when done pursuant to a contract ratified by Congress,

[33] The statement is to be qualified by the fact that state municipal law at the time of cession is taken to be adopted under principles of international law, *Chicago & Pacific Railway Co.* v. *McGlinn,* 114 U. S. 542, 546–547; *Vilas* v. *Manila,* 220 U. S. 345, 357; cf. *Murray* v. *Gerrick & Co.,* 291 U. S. 315, 319. Similarly, Congress has periodically legislated to adopt as its own the criminal laws of a state, so far as the offenses are not covered by the Criminal Code (see Sec. 272), and made those existing at the time of legislation applicable to Federal territory within the state. See, e. g., Act of March 3, 1825, c. 65, 4 Stat. 115; R. S. Sec. 5391; Act of June 15, 1933, c. 85, 48 Stat. 152 (U. S. C., Title 18, Sec. 468); *United States* v. *Press Publishing Co.,* 219 U. S. 1. But these laws are, of course, Federal laws and are enforced by Federal officials and in Federal courts.

is conclusive that the United States has not accepted exclusive jurisdiction of the territory.

We conclude that the United States does not have exclusive jurisdiction over the Washington area because, whether such jurisdiction be viewed as resting on purchase under Clause 17 or on cession by the State, the United States has not accepted such jurisdiction. This means that the State retains its general jurisdiction, subordinate to the Federal power to construct, operate and protect the Grand Coulee project. We indicated in Point I that taxation of private persons presents no interference to this power. We conclude, therefore, that the gross receipts tax of the State may validly be applied to the appellants in the *Mason* and *Ryan* cases, Nos. 7 and 8.

4. *Miscellaneous Problems If Our Views Are Rejected*

a. Problems of Consent Under Clause 17

If the Court should reject our argument as to the necessity that the United States accept an exclusive jurisdiction which otherwise would pass to it, and hold that exclusive jurisdiction has vested under Clause 17, it will be necessary to decide several subsidiary points. We assume here that the Court would decide that exclusive jurisdiction has not been transferred by cession.

In Washington the United States acquired partially by deed, partially by condemnation, and partially by direct grant from the State, areas on each side of the river which were used by the contractors

in the performance of their work. (No. 7, R. 103–106, Original Exhibit C; No. 8, R. 12, 18, 19, 20.) The Silas Mason Company, furthermore, used in the performance of its contract certain Indian lands, title to which was in the United States for the benefit of the Indians. (No. 7, Original Exhibit C.) Also, the United States acquired title partially by deed and partially by condemnation to the land upon which the railroad was built by Ryan. (No. 8, R. 15.) Title to the bed of the river used for the dam remained in the State of Washington, except in sofar as it may have passed from the State to the Federal Government by reason of Sections 7411 and 7412 of Remington's Revised Statutes of Washington, *infra,* pp. 113–115.

1. In connection with our discussion of the West Virginia territory we have indicated (*supra,* pp. 66–68) that land acquired by condemnation is purchased within the meaning of Clause 17. Similarly, we have indicated (*supra,* pp. 62–66) that land acquired in connection with the construction of a dam is acquired for a "needful building". These conclusions are equally applicable here.

2. The ***Ryan*** case, No. 8, presents the further problem as to whether land acquired for a railroad, about 30 miles in length, to the site of the Grand Coulee Dam is acquired for a purpose within Article I, Section 8, Clause 17 of the Constitution. (R. 5, 15, 16.) Although it might be doubtful that a railroad itself is a "needful building" under that

clause, it is our view that the land acquired for the railroad in this case may be brought within the clause as a part of the area necessary to the construction and operation of the dam. This Court has held that a hotel operated in conjunction with a military hospital was within the terms of Clause 17. *Arlington Hotel* v. *Fant,* 278 U. S. 439, 455. And whatever reason there may be for providing for exclusive jurisdiction over any structure plainly extends to the appurtenant lands and construction which are necessary for the maintenance and operation of that structure.

However, the Report of the Columbia River Basin Commission (No. 7, Ptf. Oreg. Ex. C, p. 41) indicates that at least a part of the railroad is constructed in the Grand Coulee. When the dam is finally completed the Grand Coulee will be used as an irrigation reservoir and the land will be submerged. Thus there is a subsidiary question presented, as to whether land purchased for temporary use in connection with a permanently-owned dam is within Clause 17. See *Six Cos., Inc.* v. *DeVinney,* 2 F. Supp. 693, 698 (D. Nev.); *United States* v. *Tierney,* 1 Bond 571, 573 (C. C. S. D. Ohio); 37 Op. A. G. 288, 291; Op. of the A. G. to the Secretary of the Interior, July 18, 1934. We are of the view that land permanently acquired, and used for a purpose which satisfies Clause 17 at the time of acquisition, vests jurisdiction in the United States which does not revert when the purpose is completed. Otherwise, the jurisdiction would fluctuate between the

nation and state as the work progressed. However, if the Court should differ with us, it then becomes necessary to decide whether land which will lie in the reservoir created by the dam is a needful building. It has been held that reservoirs and aqueducts are needful buildings. 26 Op. A. G. 289. This seems to be the correct view, at least when appurtenant to a dam which itself is a needful building.

3. The State of Washington conveyed certain school lands directly to the United States for use in connection with this project (No. 8, R. 104).

The Supreme Court of Washington has construed the statute granting consent to the acquisition of property by the United States under clause 17 as not covering lands granted directly by the State to the United States. *State ex rel. Bussell* v. *Callvert,* 33 Wash. 380. There the court said (p. 390):

> We do not think that it can reasonably be said that, when the legislature granted to the United States the *consent* of the state to acquire, by purchase or by condemnation, land from individuals or bodies politic, *within this state,* for specified purposes, they intended thereby to grant consent to purchase lands *from the state.* If such was their intention, we think they would have expressed it in plain and unequivocal language.

Accordingly, we believe there has been no consent by the legislature with regard to the state school

lands which were transferred to the United States.

4. The doctrine of the *Callvert* case would, if it stood alone, seem also to apply to the bed of the Columbia River. This land was the property of the State. Washington Constitution, Art. XVII, sec. 1; *Brace & Hergert Mill Co.* v. *State,* 49 Wash. 326; *Hauge* v. *Walton,* 72 Wash. 554; cf. *Massachusetts* v. *New York,* 271 U. S. 65, 89. But the State has conveyed at least a limited title to the United States. Section 7411 of Remington's Revised Statutes provides in part:

> The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation [of waters for irrigation] hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works.

This would seem to remove the river beds from the operation of the *Callvert* case, with the result that the State has consented to the "purchase" of the property. But we doubt that this title, which extends only "to the extent necessary for the maintenance, operation, and control" of the project is sufficient to support exclusive jurisdiction under Clause 17. See *United States* v. *Tierney,* 1 Bond 571, 573 (C. C. S. D. Ohio). So far as this dam, which is constructed for the purposes of navigation as well as irrigation, is concerned, Section 7411

conveys nothing more that the easement which the United States would have in any event by virtue of its paramount power under the commerce clause. We therefore incline to the opinion that there has been no purchase of the river bed under Clause 17.[34]

5. It appears, although none too clearly, that a part of the area used by the contractors in constructing the Grand Coulee dam is Indian tribal land. (No. 7, R. 104.) If this be the case, there has been no purchase of the area under Clause 17. Title to those lands was originally in the United States for the benefit of the Indians on the Colville Reservation. See Executive Order of July 2, 1872 (Executive Orders Relating to Indian Reservations from May 14, 1855, to July 1, 1912, p. 195). At a later date the lands were opened for entry (Act of March 27, 1906, 34 Stat. 80; Proclamation of the President, May 3, 1916, 39 Stat. 1778), but were withdrawn for this project before any entry was made. Title to these lands having always been in the United States, it follows that the property could not have been acquired or purchased under Clause 17. *Fort Leavenworth R. R.*

[34] This conclusion makes it unnecessary to decide whether lands acquired by direct grant from the State are purchased within the meaning of Article I, Section 8, Clause 17. The authorities are divided. *United States* v. *Tucker*, 122 Fed. 518, 520 (W. D. Ky.), states that this amounts to a purchase under Clause 17. *Crook, Horner & Co.* v. *Old Point Comfort Hotel Co.*, 54 Fed. 604 (C. C. E. D. Va.), holds to the contrary, while *Lowe* v. *Lowe*, 150 Md. 592, 599, contains a dictum which appears to indicate an agreement with the *Crook, Horner* case.

Co. v. *Lowe,* 114 U. S. 525, 539; *United States* v. *Unzeuta,* 281 U. S. 138, 141–142; *United States* v. *Bateman,* 34 Fed. 86 (C. C. N. D. Cal.); *St. Louis-San Francisco Ry. Co.* v. *Satterfield,* 27 F. (2d) 586 (C. C. A. 8th); *Chicago, R. I. & P. Ry. Co.* v. *Satterfield,* 135 *Okla.* 183.

b. Problems Relating to Cession

If the Court should reject our argument that the United States does not have exclusive jurisdiction, and if this decision should be based upon the view either (1) that there has in fact been an acceptance or (2) that an acceptance is unnecessary even under a cession of jurisdiction, the United States would then have exclusive jurisdiction under the Washington cession of jurisdiction.

This cession clearly would cover all the land the United States acquired from private persons.

The United States would, we believe, have exclusive jurisdiction over the river bed. The Washington statute would seem to pass a title sufficient to support a cession of jurisdiction (at least where the land will permanently be used by the United States), even though it is insufficient to constitute a "purchase" under Clause 17. (See *supra,* p. 102.)

The United States also would have exclusive jurisdiction over the Indian tribal land. Section 8108 of Remington's Revised Statutes of Washington, *infra,* pp. 115–117, cedes jurisdiction not only over lands acquired but also over those "set apart by the general government" for the sites of "locks, dams, * * * and other necessary structures and pur-

poses required in the improvement of rivers and harbors in this state." There is, of course, no question as to the power of the State to cede its jurisdiction over lands owned by the United States. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647.

The United States would not have exclusive jurisdiction over the school lands, because the Section 8108 has been construed as inapplicable to land conveyed by the State (see *supra*, p. 101).

CONCLUSION

It is our view that none of the contractors in these cases can claim immunity from the gross receipts tax because his work is done for the Federal Government. We are further of the opinion that a part of the area involved in the West Virginia case is within the exclusive jurisdiction of the United States, while another part is not. Finally, we believe that none of the Washington territory involved in these cases is within the exclusive jurisdiction of the United States.

1. In *James* v. *Dravo Contracting Co.*, No. 3, the contractor sought to enjoin the threatened collection of the West Virginia tax because, *inter alia*, it burdened the Federal Government in the performance of a constitutional function, and because the United States had exclusive jurisdiction over the area (R. 21, 24–25). The three judge District Court granted a permanent injunction (R. 415) because the tax was deemed an unconstitutional interference with the activities of the Federal Government (R. 410–414). If the issues upon

which we have submitted the views of the Government control the disposition of the case, we are of the view that this decree must be modified.

The appellee performed the work partly on territory which was within the exclusive jurisdiction of the United States and partly on territory within State jurisdiction. Thus, the work done over the beds of the Kanawha and Ohio Rivers [35] would seem to be within the State jurisdiction. Similarly, the appellee leased land from private owners for storing materials and machinery near three of the dams (R. 408). This area is, of course, within the taxing jurisdiction of the State. On the other hand, the work done on the land acquired by the United States on both sides of the rivers was done on territory within exclusive Federal jurisdiction and may not be subjected to taxation by the State.

Section 2 (e) of Chapter 33 of the Laws of 1933, *infra*, p. 113, imposes, "on account of the business and other activities", an annual privilege tax of two percent of the gross income "upon every person engaging or continuing within this State in the business of contracting." This statute apparently would permit allocation of the contractor's activities and the imposition of the tax measured by the gross income derived from activities within the State.

Some portion of the tax of $135,761.51 assessed against the appellee (R. 409) is therefore valid. Accordingly, it appears to be necessary to remand

[35] The dams were constructed at points within the exterior boundaries of West Virginia (R. 406).

the cause to the District Court for an allocation of the gross income between activities carried on in West Virginia and those in the United States territory, with directions to enter a permanent injunction against collection of any part of the assessment which is based on gross income derived outside of the State. This would permit the appellant Tax Commissioner to make the allocation, if permitted by the statute, with a right in the appellee to have review by the three judge District Court if the appellee thought the mandate had been disobeyed.

2. In *Silas Mason Co. et al.* v. *Tax Commission,* No. 7, plaintiffs sought an injunction in the Superior Court of the State of Washington for Thurston County against the defendants' taking any steps to force the plaintiffs to file an occupation tax return, or otherwise to do anything looking to the laying of the tax (R. 17). The Federal grounds alleged were that the tax was barred because the tax was upon the plaintiff's contract with the United States and that the territory on which the business was conducted was within the exclusive jurisdiction of the United States (R. 15–16). The Superior Court dismissed the bill (R. 55) and the Supreme Court of the State affirmed this judgment (R. 69). We are of the view that the sovereign immunity from taxation does not protect the appellants, and that the United States has not accepted exclusive jurisdiction over the territory. It results that the decision of the Supreme Court of Washington should be affirmed.

3. In *Ryan* v. *State of Washington et al.*, No. 8, the appellant brought two actions against the appellees in the Superior Court of the State of Washington for Thurston County. The first was an appeal from an order of the Tax Commission, and is brought against the State alone. It seeks recovery of $4,012.25 paid to the State for the occupation tax and penalties imposed upon the proceeds of the appellant's contract with the United States to do excavation work at the dam site and of appellant's merchandising business conducted on the Government property (R. 1–5, 9, 11–12). The second action was brought against the Tax Commission, and seeks to enjoin the defendants from assessing or collecting a tax on the receipts from appellant's contract to construct the railroad (R. 4–6). The Superior Court apparently dismissed each of the complaints (R. 36), and the Supreme Court of the State affirmed the judgment (R. 35).

The case plainly presents the question as to whether the work was performed on territory within the exclusive jurisdiction of the United States. However, it is doubtful whether the question of exemption by reason of intergovernmental immunity has been properly raised by the appellant. The only reference to the question in the complaints consists of statements in each complaint that the work was done solely for the United States (R. 2, 5), and a statement in the complaint in the first case that the income received is the result of a

sale of services to the United States and so is exempt from taxation (R. 3). The State Supreme Court in its opinion discusses no Federal question except that concerning jurisdiction over the territory. The assignment of errors in this Court, however, raises the question as to the burden of the tax on the Federal Government (R. 53). If on this record the immunity question is not properly raised, it may be that the judgment should be affirmed on the sole ground that the United States has not accepted exclusive jurisdiction over this area.[36]

Respectfully submitted.

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SEPTEMBER 1937.

[36] If the Court should, however, decide that the contractors are immune from these taxes because their application is an unconstitutional interference with the functions of the United States, we suggest, even if the question is not properly raised, that the judgment in the *Ryan* case be vacated and the case remanded to the State court for further proceedings. Compare *Patterson* v. *Alabama*, 294 U. S. 600.

APPENDIX A

Constitution of the United States, Article I, Section 8, Clause 17:

> The Congress shall have power. * * *
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Official Code of West Virginia, 1931, c. 1, Art. 1:

> SEC. 3. *Acquisition of Lands by United States; Jurisdiction.*—The consent of this State is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for lighthouses, beacons, signal stations, post offices, customhouses, courthouses, arsenals, soldiers' homes, cemeteries, locks, dams, armor plate manufacturing plants, projectile factories or factories of any kind or character, or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse, or work of public improvement whatever,

or for the conservation of the forests, or for any other purpose for which the same may be needed or required by the government of the United States. The evidence of title to such land shall be recorded as in other cases.

Any county, magisterial district or municipality, whether incorporated under general law or special act of the legislature, shall have power to pay for any such tract or parcel of land and present the same to the government of the United States free of cost, for any of the purposes aforesaid, and to issue bonds and levy taxes for the purpose of paying for the same; and, in the case of a municipal corporation, the land so purchased and presented may be within the corporate limits of such municipality or within five miles thereof: *Provided, however,* That no such county, magisterial district or municipality shall, by the issue and sale of such bonds, cause the aggregate of its debt to exceed the limit fixed by the Constitution of this State: *Provided further,* That the provisions of the Constitution and statutes of this State, or of the special act creating any municipality, relating to submitting the question of the issuing of bonds and all questions connected with the same to a vote of the people, shall, in all respects, be observed and complied with.

Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the United States shall for five consecu-

tive years fail to use any such land for the purposes of the grant, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall reinvest in this State. The jurisdiction ceded shall not vest until the United States shall acquire title of record to such land. Jurisdiction heretofore ceded to the United States over any land within this State by any previous acts of the legislature shall continue according to the terms of the respective cessions.

SEC. 4. *Execution of Process and Other Jurisdiction as to Land Acquired by United States.*—The State of West Virginia reserves the right to execute process, civil or criminal, within the limits of any lot or parcel of land heretofore or hereafter acquired by the United States as aforesaid, and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition.

Chapter 11, Article 13:

SEC. 2. *Imposition of Privilege Tax.*—There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values or gross income, as the case may be, as follows:

* * * * *

(e) Upon every person engaging or continuing within this State in the business of contracting, the tax shall be equal to three-tenths of one per cent of the gross income of the business;

* * * * *

West Virginia, Acts, 1933, First Extraordinary Session, Chapter 33:

> That sections one through seventeen, inclusive, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, be and are hereby repealed and sections one through twenty-three, inclusive, be and are hereby enacted in lieu thereof; and that sections eighty-one through eighty-four, inclusive, article twelve, chapter eleven of said code be and are hereby repealed and article twelve (a) be and is hereby enacted and added to chapter eleven.
>
> * * * * *
>
> SEC. 2. There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income, as follows:
>
> * * * * *
>
> (e) Upon every person engaging or continuing within this state in the business of contracting, the tax shall be equal to two per cent of the gross income of the business;
>
> * * * * *

Remington's Revised Statutes of Washington:

> SEC. 7411. *Appropriation—Title to beds and shores.* Whenever said secretary of the interior or other duly authorized officer of the United States shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410

any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association, except that the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works.

SEC. 7412. *Reservation of necessary lands by United States—Procedure.*—When the notice provided for in section 7410 shall be given to the commissioner of public lands the proper officers of the United States may file with the said commissioner a list of lands (including in the term "lands" as here used, the beds and shores of any lake, river, stream, or other waters) owned by the state, over or upon which the United States may require rights of way for canals, ditches, or laterals or sites for reservoirs and structures therefor or appurtenant thereto, or such additional rights of way and quantity of land as may be required for the operation and maintenance of the completed works for the irrigation project contemplated in such notice, and the filing of such list shall constitute a reservation from the sale or other disposal by the state of such lands so described, which reservation shall, upon the completion of such works and upon the United States by its proper officers filing with the commissioner of public lands of the state a description of such lands by metes and bounds or other definite description, ripen into a grant from the state to the United States. The state, in the disposal of lands granted from the United States to the state, shall reserve for the United States rights of way for ditches, canals, laterals, telephone and transmission lines which may be required by the United States for the construction, operation and maintenance of irrigation works.

SEC. 8108. *Consent to acquisition of certain rights by United States, etc.*—The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation

of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States, which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent, or other official document or papers describing such lands; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so

acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted.

Laws of Washington, Special Session, 1933, Chapter 57:

SECTION 1. That chapter 191 of the Laws of 1933 be, and the same hereby is, amended by adding thereto a new section, to be known as section 2–a, to read as follows:

"SECTION 2–A. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; for the purposes of this act a person engaged in a business or profession shall include all persons whose services are paid from public funds holding any public office or any public position or employment with the State of Washington or any political subdivision thereof, whose monthly salary exceeds $200.00 per month. This section shall apply, also, to every person taxable under section 2 of this act with respect to any portion of the gross

income of the business derived from activities not taxable under the provisions of said section 2."

* * * * *

Laws of Washington, 1935, Chapter 180:

SEC. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

* * * * *

(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), and (d) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion, or other than by outright sale); repairing, personal, business, professional, mechanical, and educational service businesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses.

APPENDIX B

The Volume of Taxes Which Might Be Realized From Contractors and Vendors Who Deal With the Federal or State Governments

It is wholly impossible to make a tolerably satisfactory estimate of the savings which the Federal Government derives from the doctrine that its contractors and vendors are immune from gross receipts and sales taxes. While it is possible to make a reasonably accurate estimate of Federal construction contracts, there is no information available which would permit segregation and classification of Federal purchases according to the situs of the purchase. There is an equally great difficulty in estimating the added Federal revenues which would result from the imposition of various excise taxes upon sales to State governments and their political subdivisions. Even if a precisely accurate estimate could be made, and a figure be reached as to the comparative savings realized under existing legislation, the result would have only a transitory significance. None can predict the future tax structures either of the states or of the nation.

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However, we have assumed that any estimate, however unsatisfactory, is better than none. We, therefore submit: (1) an estimate of the volume of Federal construction let to independent contractors and the added cost of such work if subject to gross receipts taxes; (2) an estimate of Federal purchases of goods, and their additional cost if subject to state sales tax laws; (3) an estimate of the increased Federal revenues obtained if the corresponding immunity of the states were abolished. In each estimate, we have assumed that the full amount of the tax will be passed on to the purchasing government.

1. FEDERAL CONSTRUCTION CONTRACTS

There are, at the present time, six states with a gross receipts tax applicable to contractors.[1] Our problem, then, is to ascertain the volume of Federal construction done through independent contractors in these states.

The Division of Construction and Public Employment in the Bureau of Labor Statistics, Department of Labor, has tabulated the volume of Federal construction in these states during the calendar year 1936, as follows:

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[1] Arizona, Laws, 1935, c. 77, as amended by S. B. No. 2, Laws of 1937, Sec. 2 (h) (1%, less cost of labor); Indiana, Acts 1933, c. 50, Sec. 3 (f) (1%); Mississippi, Laws 1934, c. 119, Sec. 2 (e), as amended by Laws 1936, c. 158, Sec. 5 (1%); New Mexico, Laws 1935, c. 73, Sec. 201 F. (1% less cost of goods bought subject to state tax); Washington, Laws 1935, c. 180, Sec. 4 (e), *supra*, p. 118 (½%); West Virginia, Acts 1933, c. 33, Sec. 2 (e), *supra*, p. 113 (2%).

Value of contracts awarded and force-account work started on construction projects financed from Federal funds during the calendar year 1936, by States

[In dollars]

States	Works Program	Regular appropriation	Public Works Administration		Total, All Funds	Total of Federal Construction Activity [1]
			Federal	Non-Federal		
Arizona	7,987,977	4,030,818	1,905,182	2,069,020	15,992,997	13,923,977
Indiana	8,620,525	10,062,825	616,586	16,136,958	35,436,894	19,299,936
Mississippi	5,520,797	5,595,284	2,768,855	21,339,168	35,224,104	13,884,936
New Mexico	4,517,847	9,280,884	1,060,520	1,942,920	16,802,171	14,859,251
Washington	6,928,892	17,643,676	120,481	10,096,877	34,789,926	24,693,049
West Virginia	5,125,719	1,371,592	241,406	2,135,378	8,874,095	6,738,717

[1] This column is our own tabulation, and is derived by subtracting the non-Federal P. W. A construction from the total of all funds.

It will be noted that these figures include work directly performed by the Government and also whatever work was done on exclusively Federal territory.[2]

The Federal Government in the calendar year 1936 began construction work valued at $952,332,000.[3] The Central Statistical Board reports, after consultation with the Division of Construction and Public Employment, that "of this total, contracts were awarded amounting to $718,484,000." This represents a ratio of 75.4% of Federal construction

[2] The tabulation also covers contracts awarded and Federal work started during the calendar year, rather than the actual volume of construction. It should, however, be a fair index of actual activity during any given year.

[3] This figure is derived from the table found at page 75 of Building Construction, February 1937, Bureau of Labor Statistics, Department of Labor.

The figure does not include construction projects financed by the Federal Government but conducted under the auspices of state or local governments or private persons.

activity which is done by letting contracts rather than by the Government itself. If we apply a ratio of 75% to the six states with gross receipts taxes, an approximation of the volume of contracts awarded in those states in 1936 can be obtained as follows:

State	Total of Federal Construction Activity	Total, Federal Construction Contracts Awarded (75% of first column)
Arizona	$13,923,977	$10,442,983
Indiana	19,299,936	14,474,952
Mississippi	13,884,936	10,413,702
New Mexico	14,859,251	11,144,438
Washington	24,693,049	18,519,787
West Virginia	6,738,717	5,054,038

The remaining deduction is for contract work done on Federal territory. The Division of Construction and Public Employment has tabulated certain construction work, which may be taken to have been performed largely upon Federal territory,[4] as follows:

Value of Contracts Awarded During 1936 for Post Offices, Court Houses, and Quarantine Stations

Arizona	$255,960
Indiana	2,411,533
Mississippi	373,542
New Mexico	137,251
Washington	385,168
West Virginia	568,624

[4] Some portion of each project of this nature will probably have been performed on the adjoining State territory. Even if the State statutes were construed to cover an allocate portion of this activity, the added tax burden would be small. Accordingly, we make no adjustment for this factor.

A further deduction may be made for the construction work performed for the Quartermaster Corps, the National Park Service and the Bureau of Prisons, most of which may be taken as performed on Federal territory. The Central Statistical Board, after consultation with the Division of Construction and Public Employment, reports that contracts awarded by these three branches in the calendar year 1936 totalled $11,762,000. This is 1.6% of the total contracts awarded in the year 1936. If we assume that the five States in question had a proportionate amount of construction activity of this sort, we may deduct not only the figure for post offices, courthouses, and quarantine stations but also 1.6% of the total value of contracts awarded and thus obtain an approximate figure for the contract work subject to taxation.[5]

	Total Federal construction contracts (*supra*, p. 122)	Quartermaster corps, Prisons, Park Service (1.6% of total)	Post offices, courthouses, and quarantine stations (*supra*, p. 122)	Total Federal construction contracts on State territory (first column minus total of second and third)
Arizona	$10,442,983	$167,088	$255,960	$10,019,935
Indiana	14,474,952	231,599	2,411,533	11,831,820
Mississippi	10,413,702	166,619	373,542	9,873,541
New Mexico	11,144,438	178,311	137,251	10,828,876
Washington	18,519,787	296,317	385,168	17,838,302
West Virginia	5,054,038	80,865	568,624	4,404,549

We may then apply the applicable tax rates, with rough deductions for the specified exemptions, in order to determine the total savings realized by the Federal Government if those who contract with it are held exempt from the gross receipts taxes.

[5] We have omitted work done on dam sites, since it is difficult to make any general prediction that the territory is within exclusively Federal jurisdiction.

	Total Federal construction contracts on State territory	Approximate deductions for exemptions	Taxable volume of construction contracts	Tax rate	Tax payable by contractors
Arizona	$10,019,935	[1] $3,006,981	$7,013,954	1%	$70,140
Indiana	11,831,820	None	Same	1%	118,318
Mississippi	9,873,541	None	Same	1%	98,735
New Mexico	10,828,876	[2] 1,082,888	9,745,988	1%	97,460
West Virginia	4,404,549	None	Same	2%	88,091
Washington	17,838,302	None	Same	0.5%	89,192
Total					561,936

[1] We are informed that approximately 30 percent of the contract valuation is expended for labor. Section 2 (h) of the Arizona law, *supra*, apparently allows a deduction equivalent to the amounts paid for labor.

[2] Section 201 F of the New Mexico law, *supra*, permits the deduction from gross income of the cost of materials used "upon which a two percent tax has been paid." We have arbitrarily assumed that 10 percent of the contract valuation would be so expended.

We conclude, therefore, that the United States would derive annual savings of about $575,000, under existing legislation and at the 1936 volume of construction by Federal contractors, if this Court should hold that a state gross receipts tax cannot validly be applied.

If more States should enact a gross receipts tax, the potential savings of the United States under such a rule become greater. We have earlier shown that in 1936 Federal contracts were awarded in the amount of $718,484,000. As before, we may assume that work done by the Quartermaster Corps, by the National Park Service, for the Bureau of Prisons and for post offices, courthouses and quarantine stations, as well as work done in the District of Columbia, will be done in exclusively Federal jurisdiction. The total of this type of contract work in 1936 was $67,634,000.[6] This leaves an assumed total of $650,850,000 of Federal contract

[6] Figures supplied by the Division of Construction and Public Employment, Bureau of Labor Statistics, Department of Labor.

work awarded to be done on State territory. If each of the 48 States were to impose a gross receipts tax of 1 per cent, the possible tax collections from Federal contractors would be about $6,500,000. A more likely assumption is that, say, one-half of them will enact such statutes. In such a case, the figure would become roughly $3,250,000 under the present volume and methods of Federal construction.

2. SALES TAXES ON FEDERAL PURCHASES

It is impossible to obtain a complete analysis of the Federal purchases of goods and supplies. Even if this were available, it would then be necessary to ascertain which of the sales were (1) consummated on territory which is within the exclusive jurisdiction of the United States, or (2) made in interstate commerce, such that the state sales taxes could not be imposed. As to this, there is no information whatever.

However, the Division of Construction and Public Employment, in the Bureau of Labor Statistics, Department of Labor, has a tabulation of most of the supply contracts over $10,000 in amount which have been awarded by the Federal Government [7] from September 28, 1936, to June 30, 1937.

[7] The Act of June 30, 1936 (c. 881, 49 Stat. 2036), requires that public contractors operating under contracts of over $10,000 comply with specified labor standards and commits enforcement to the Secretary of Labor. Information collected in this connection does not include (1) contracts under $10,000; (2) supplies purchased without contract; (3) nor, under Section 9 of the Act, (a) purchases of supplies usually bought in the open market, (b) perishables, or (c) agricultural products sold by the producer or to the Secretary of Agriculture.

We reprint the main headings of the tabulation. (Employment and Payrolls, June, 1937, Bureau of Labor Statistics, Department of Labor, Serial No. R. 604, pp. 36–38):

Value of supply contracts awarded by the Federal Government which contain agreements to comply with the Public Contracts Act, by industrial groups and type of material

[Subject to revision]

Type of Materials	Value of Contracts Awarded		
	From Sept. 28 to Dec. 31, 1936	First Quarter 1937	Second Quarter 1937
All materials	$39,975,952	$76,377,704	$81,133,508
Food and kindred products	1,425,903	4,066,107	2,876,354
Textiles and their products	6,501,319	34,127,602	10,999,856
Forest products	809,202	822,271	2,156,581
Paper and allied products	2,312,464	410,195	5,637,666
Chemicals and allied products	992,535	1,196,072	2,536,943
Products of asphalt, coal, and petroleum	11,396,619	5,096,152	19,835,108
Leather and its manufactures	1,237,698	3,105,231	1,640,989
Stone, clay, and glass products	3,205,890	2,284,895	4,199,907
Iron and steel and their products, not including machinery	2,799,740	4,362,305	3,965,305
Nonferrous metals and their alloys	370,063	1,720,297	1,329,510
Machinery not including transportation equipment and electrical equipment	1,572,719	6,199,174	6,616,197
Electrical machinery, apparatus, and supplies	2,358,605	5,026,626	5,463,134
Transportation equipment	3,399,060	5,966,334	10,128,868
Miscellaneous	1,594,135	1,994,443	3,747,090

This table shows Federal purchases of these types during 75.2 percent of a calendar year in an amount of $197,487,164. This would indicate, roughly, annual Federal purchases of about $263,000,000 which fall within these categories. If we take the total value of such contracts during the first half of 1937 ($157,511,212), annual purchases of these types would be supposed to be about $315,000,000. For present purposes, we may roughly assume that this category of Federal purchases amounts to about $290,000,000.

Such guesses as we have been able to obtain indicate that these supply contracts represent perhaps 25 to 30 per cent of the total Federal purchases. Very roughly, then, we may assume that the total Federal purchases of goods are about $1,000,000,000 per year.

From this amount we must deduct the quantity of goods which are sold in interstate commerce and the sales of which are consummated on exclusively Federal territory. No intelligent guess can be made as to this, but we shall arbitrarily assume that 50 per cent of the sales are of this character. This gives total Federal purchases of $500,000,000 subject to taxation.[8]

Twenty-six states and New York City have sales tax laws.[9] Most of these would not certainly be applicable to sales made to the United States even under our views as to intergovernmental tax immunity. For, of these laws, only eleven seem properly to be classified as taxes upon the vendor as opposed to the vendee.[10] Compare, however,

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[8] The typical sales tax statute exempts certain types of products, notably foods or agricultural products. We have made no reduction for this. But our estimates are so extraordinarily rough that refinements of this nature are uncalled for.

[9] The most convenient compilation of state sales tax laws seems to be Sales Tax Laws, Western States (Commerce Clearing House). The chart at pp. 7–11 includes all states as of July 1, 1937. In view of the extremely rough nature of our speculations in this section, we will not give specific citations to the statutes.

[10] Alabama, Arizona, Delaware, Illinois, Indiana, Michigan, New Mexico, North Carolina, Pennsylvania, South Dakota, and Virginia.

United States v. *Perkins*, 163 U. S. 625. Of these eleven states, three have statutory exemptions which are applicable when sales are made to the United States.[11] This leaves the Federal purchases subject to only eight state sales taxes.[12] If we arbitrarily assume that the Federal purchases in state territory are equally distributed between the states, this would mean that only one-sixth of the Federal purchases would be made in states with existing sales tax laws. This reduces the volume of taxable purchases from $500,000,000 to about $85,000,000. Since the average tax in those eight states is about 1.5 per cent, we may then assume that the annual added tax burden on purchases made by the United States will be about $1,300,000 under existing legislation. We again repeat that the margin of error in this estimate is probably several hundred per cent.

Since it would be merely a matter of legislative amendment to cover sales made to the United States, it is perhaps fairer to assume that the sales tax laws of each of the states would be such as to cover the sales made to the United States. Also, the reasoning of *United States* v. *Perkins*, *supra*, sustaining an inheritance tax on a legacy to the Government, might cover transactions such as

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[11] Arizona, New Mexico, and South Dakota.

[12] Alabama (2%), Delaware (1/10 of 1%), Illinois (3%), Indiana (1%), Michigan (3%), North Carolina (3%), Pennsylvania (1/10 of 1%), and Virginia (about 0.15%). The definition of retail sales in each state seems to be such as to include all commercial sales not made for resale.

these. In this view of the problem, there would be twenty-six states and New York City with sales tax laws applicable to purchases made by the United States. We may arbitrarily assume that these would cover 27/49 of the total purchases of the United States which would be subject to such taxation.[13] Applying this ratio to the figure of $500,000,000, we would have about $275,000,000 of Federal purchases subject to taxation. The arithmetic average of the sales taxes is almost precisely 2 per cent. Using this percentage, we should have an additional cost to the Federal Government of about $5,500,000 if every state which now has sales tax laws were to apply them to include sales made to the United States. We again emphasize that this figure is so rough that it cannot be thought to be even approximately correct.

Of the special State sales taxes, the gasoline tax is of outstanding importance. It has roughly been estimated that the exemption of the vendor who sells to the United States results in annual savings of about $4,500,000. See *Graves* v. *Texas Co.*, 298 U. S. 393, 395.

3. INCREASED FEDERAL REVENUES

There are a number of Federal taxes the yield of which would be somewhat increased if they could constitutionally be imposed on sales made to

[13] We have not weighted those states according to population, since in many of the Western states there have been very large Federal purchases in states of small population.

states and their political subdivisions.[14] It is impossible even roughly to estimate the savings made possible to the local governments through this tax exemption. The Central Statistical Board, however, has made an estimate of the approximate savings realized in 1935 by Pittsburgh, Pennsylvania.[15] Their investigation indicates a total saving for the year of at least $10,000. It is tabulated as follows:

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[14] They are conveniently collected in Tax Systems of the World, prepared by the Tax Research Foundation (1935 ed.), pp. 10–13. A number of these excises are by statute made inapplicable to articles purchased by States and their political subdivisions. See Section 4 (a) of c. 96, 48 Stat. 254, and Section 401 of the Revenue Act of 1935, c. 829, 49 Stat. 1014, 1025. In this discussion we will assume that this statutory exemption would be eliminated if the constitutional question were clarified. See Recent Federal-City Relations, U. S. Conference of Mayors (1936), pp. 28–32.

[15] The Board states:

"It is unusual in State or municipal reports of expenditures to have any but the most rudimentary classification by object, and it is especially difficult to obtain quantitative information, by the units on which the Federal taxes are based, about purchases of some important taxable commodities. The most difficult data of this kind to obtain for any local-government unit are the purchases of gasoline and lubricating oil, by gallons; and automobile and motorcycle tires and inner tubes, by pounds. The city of Pittsburgh, Pennsylvania, was chosen as the illustrative city for the tabulation, since it was the only city for which these particular data could be obtained or approximately computed from reports readily available in Washington. Comparative notes from some other cities on certain items are also included."

Approximate value to the Pittsburgh city government of exemption from Federal taxes on city purchases during 1935

Commodity	Purchases		Federal tax rate	Approximate value of tax exemption
	Approximate amount [1]	Unit		
1. Gasoline	540,000	Gal.	1¢ gal.	[2] $5,400
2. Lubricating oils	44,000	Gal.	4¢ gal.	1,760
3. Tires (auto and motorcycle)	[3] 39,200	Lbs.	2¼¢ lb.	880
4. Inner tubes (auto and motorcycle)	[3] 3,600	Lbs.	4¢ lb.	145
5. Automobiles (except trucks) and motorcycles.	$27,000	Dollars	3%	[4] 810
6. Automobile trucks	33,500	Dollars	2%	[4] 670
7. Automobile parts	19,300	Dollars	2%	[4] 390
8. Radios and parts	700	Dollars	5%	[5] 35
Total tax savings on purchases enumerated above.				10,090
9. Telegraph	(6)	(6)	5%	(7)
10. Telephone, etc.	(6)	(6)	Various	(7)
11. Firearms and shells	(6)	(6)	10%	(8)
12. Electrical energy	(6)	(6)	3%	(9)
13. Oleomargarine, soap, alcoholic beverages, mechanical refrigerators, cameras, etc.	(6)	(6)	Various	(9)

[1] From Pittsburgh Department of Supplies, Commodity Record of Purchases for 1935 (typewritten).

[2] Compare New York City's savings of $140,000 thru exemption from Federal taxes of purchases in 1936 of 13,988,000 gallons of gasoline. (Report to Mayor F. H. LaGuardia on the Work of the Department of Purchase for the Year 1936, p. 33.)

[3] Estimated from quantities of tires and tubes purchased, reported by size. Total value of tires and tubes purchased was approximately $20,000. Compare Newark's purchases, totaling approximately $25,000. (Newark, New Jersey, Report of Materials, Supplies, and Equipment Purchased by the Department of Central Purchase for the Year 1935 [mimeographed].)

[4] Compare Newark's savings in 1935, from Federal tax exemption on purchases, of approximately $400 on new automotive equipment, and $1,200 on automobile parts and accessories. (Op. cit.)

[5] Compare Newark's savings from tax exemption on radios and parts, which amounted to nearly $700. (Op. cit.)

[6] Not separately reported.

[7] On the basis of partial reports from San Diego, California, and Salt Lake City, Utah, savings would probably be far less than $50. (Annual Report of the Purchasing Agent of the City of San Diego, California, for the Fiscal Year Ending June 30, 1936, p. 11, and Salt Lake City's Appropriation Budget.)

[8] On the basis of partial reports from Newark, New Jersey, and San Diego, California, savings on such purchases may amount to between $300 and $400. (Op. cit.)

[9] Data not available.

The Central Statistical Board has translated the figure of $10,090 as Pittsburgh savings in 1935 into an arithmetic result for the country at large. It

states that this "is to be considered the roughest kind of approximation, as any accurate estimate is impossible." Its estimate is: [16]

> "A very rough estimate of the amount of exemption from Federal tax secured by all state and local governments may be made by comparing the total expenditures for current operations and maintenance of Pittsburgh in 1932 [1] with the expenditures of all state and local governments for these purposes. The ratio is about .0027,[2] and applied to the estimated tax exemption secured by Pittsburgh on its 1935 expenditures, results in an estimate for all state and local governments of approximately $3,700,000."

[1] 1932 is the most recent year for which statistics are available on the expenditures of all state and local governments. These were collected by the Bureau of the Census and published in "Financial Statistics of State and Local Governments—1932."

[2] The total expenditure figure from the source cited in the above footnote, Table 3, p. 28, "Grand Total" of "Governmental-cost payments" for "operation and maintenance of general departments" plus "operation and maintenance of public-service enterprises", is $6,357,052,000. Expenditures for the city of Pittsburgh are given in the publication of the Bureau of the Census entitled "Financial Statistics of Cities—1932", Table 3, p. 63. Only expenditures of the city corporation for the "operation and maintenance of general departments" and the "operation and maintenance of public-service enterprises" have been included. These were $17,242,078 in 1932.

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[16] The Board says, of the resulting figure of $3,700,000: This figure cannot be relied on for three reasons:

1. The ratio of Pittsburgh expenditures to the total may not have been the same in 1935 as it was in 1932.

2. Expenditures of Pittsburgh, a large city, for items on which Federal taxes are normally collected, principally auto-

However, for the purposes of an illustrative guess, we may assume that the Federal revenues would be increased by about $3,700,000 if the doctrine of tax immunity were declared to be inapplicable to sales made to states and their political subdivisions.

4. SUMMARY

Under existing gross receipts taxes, a decision that they could not constitutionally be applied to Federal contractors would apparently result in annual savings of about $575,000 to the United States. While there is insufficient data even for an intelligent guess, we have hazarded the opinion that the exemptions of vendors who sell to the United States from existing state sales tax laws results in annual savings to the United States of about $1,300,000. To this should be added the annual savings of about $4,500,000 which would result from the gasoline tax exemption. This gives a total of about $6,375,000 in annual savings.

A somewhat more realistic view would assume that each of the state sales tax laws would be amended so as to cover sales to the United States, if this Court should declare them to be taxable. If this were done, we have supposed that the cost of goods to the United States would be about $5,500,000 more each year than if this Court should declare

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motive equipment and supplies, are probably a larger proportion of total expenditures than would be the case for all state and local governments.

3. On the other hand, the estimated exemption of Pittsburgh in 1935 is probably too low, due to lack of information on purchases of certain items on which Federal taxes are normally collected.

such sales to be tax exempt. Correlatively, we might assume that one-half of the states will enact gross receipts taxes covering contracting activity. If the 1936 volume of Federal contracts were maintained, and if they were distributed equally between the states, this would give total added costs of about $3,250,000 a year. On these hypotheses, including the figure for the gasoline tax, a rule of exemption for those who deal with the Federal Government would produce annual savings to the United States of about $13,250,000.

Added revenues which the United States would obtain from those who sold to states and their political subdivisions, if the vendors could constitutionally be taxed, may be taken to be about $3,700,000, on the basis of the unsatisfactory data which is available.

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